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AND ON APPEAL THEREFROM IN THE

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1895.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1895.

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Lord HALSBURY, as Ex Lord Chancellor and as Lord Chancellor.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1894. 1895.

TASKER *v.* TASKER AND LOWE.

1894
Nov. 5, 15.

Divorce—Husband and Wife—Paraphernalia—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2, 17.

The Married Women's Property Act, 1882, has not abolished the general law as to gifts of paraphernalia.

A husband, who married after the passing of the Married Women's Property Act, 1882, made his wife valuable presents of jewellery. He stated that he only allowed her the use of them, she that he gave them to her absolutely; and her evidence was considered more to be relied on than his. It also appeared that he made the presents in the same manner and with the same words that he had used in making her presents before marriage, and never gave her to understand that the jewels were only lent to her, till he took proceedings for a divorce. Most of the presents were made on Christmas days or her birthdays, or as "peace-offerings" after disputes; and she, to his knowledge, kept the jewels in her possession or at a bank in cases stamped with her initials:—

Held, that the question whether a gift to a married woman constitutes paraphernalia was to be determined on the same principle as before the Act, and that the proper inference from the facts above stated was that the jewels were not paraphernalia, but the separate property of the wife.

CLAIM by the petitioner, under s. 17 of the Married Women's Property Act, 1882, to certain jewels as against his wife, the

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respondent. The jewels had been presented by him to her between 1888, when the marriage took place, and 1893, under the circumstances stated in the judgment of the Court.

Inderwick, Q.C., and *Priestley*, for the petitioner. It is submitted that the jewels are paraphernalia, and that as such the petitioner is entitled to take them back: *Graham* v. *Londonderry* (1); *Jervoise* v. *Jervoise.* (2) The Married Women's Property Act, 1882, does not interfere with gifts of paraphernalia, and the petitioner cannot have intended that jewels of such value should be the respondent's absolute property. In the judgment in *In re Vansittart, Ex parte Brown* (3), the old law is treated as still subsisting.

Whately, for the respondent. The question is one of fact, and the evidence is conclusive in the respondent's favour. Since the Married Women's Property Act, 1882, the presumption is that any gift to a married woman is a gift to her separate use. In *In re Vansittart, Ex parte Brown* (3), a similar present of jewels was practically held not to be paraphernalia.

Cur. adv. vult.

THE PRESIDENT. In this case a claim was made by a husband, the petitioner in a divorce suit, to jewels of considerable value, against his wife, under s. 17 of the Married Women's Property Act, 1882. The claim was referred to the Registrar, and I had his report before me. It appears from that document, and from figures supplied to me on the argument, that the value of the jewels originally in dispute was 9319*l.* 5*s.*, but that, as to a portion of those jewels, worth 1163*l.* 5*s.*, the claim of the husband was withdrawn, for the reason, as to almost all of them, that they were presents before marriage. The learned Registrar states that it was said, but not proved, that the husband's income was about 40,000*l.* a year. I was told that this was an exaggeration, but that undoubtedly he is a man of large means. Before the Registrar the husband contended that the jewels were his absolute property, and that he only allowed his wife to use them. The

(1) 3 Atk. 393. (2) 17 Beav. 566.

(3) [1893] 1 Q. B. 181.

wife, on the other hand, maintained that the jewels were given to her absolutely. The only witnesses were the husband and the wife, and there can be no doubt that their evidence was in complete contradiction. He alleged that he had used expressions to his wife about the jewels clearly indicating that they were to remain his property, all of which the wife denied. The learned Registrar has stated that, from the demeanour of the wife, he considered her evidence was to be relied upon rather than that of the husband, and he thought that she was corroborated by the following circumstances: first, that notwithstanding his evidence to the contrary, the husband never, till the suit was threatened, gave his wife to understand that the jewels were only lent to her for her use; secondly, that the jewels given after marriage were handed to the wife in the same manner, and in effect with the same words, as those given before marriage; thirdly, that the jewels were always in her possession, and when the husband and wife were abroad were, with his knowledge and approval, deposited in her name at a bank; fourthly, that some of the articles were purchased about Christmas-time and the time of her birthdays, thus tending to confirm her statement that they were Christmas or birthday presents; fifthly, that the cases of all the articles were marked with her initials, namely, those of her maiden name before marriage, and of her married name after marriage, and this, the Registrar has found, was done in every case by the husband's orders.

I see no reason to differ from the learned Registrar as to his findings of fact on the question before him. It was a case in which much depended on the demeanour of the witnesses, whom the Registrar had the opportunity of seeing. I also agree with the Registrar that the circumstances mentioned by him corroborate the wife's account; and I may add that it appears further to have been proved that a portion of the jewels in question, of considerable value, were given as what were termed "peace-offerings," on occasions when differences between the husband and wife had arisen and been dispelled.

Before me, however, at chambers, another point was taken as an alternative to that submitted to the Registrar, and this point was wholly, or almost wholly, relied on before me in Court. It

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was said that, admitting that these jewels were given by the husband to the wife, they were given as paraphernalia, and that so the husband could alien, and can reclaim them. The law of paraphernalia and the practice of constituting paraphernalia are unfamiliar, if not antiquated. But, no doubt, before the Married Women's Property Act, 1882, if a husband expressly indicated his intention to make a gift of paraphernalia, he could do so; and, even if he had never heard of paraphernalia, but the intention were made manifest that the jewels were given to the wife not absolutely, but for her use as a wife, this peculiar kind of property might be created. But I think that in some way, either from the use of apt words, or by inference from the facts of the case, it must have been shewn that the intention was not to make a present of jewels, as of any other article for personal use, in the ordinary sense, which would formerly have created a trust for separate use, and would now vest the property in the wife, but to hand over the jewellery only for the wife's decoration, so long as the husband, during his lifetime, chose that she should be so adorned. It was suggested to me that the Married Women's Property Act, 1882, had abolished paraphernalia. I do not think that Act affects a gift of paraphernalia, although some text writers have taken a different view. (See Macqueen, Husband and Wife, 3rd ed. 115; Lush, Husband and Wife, 41.) The creation of paraphernalia did not imply, nor was dependent on, the legal identity which, for most purposes, existed between husband and wife before that Act, and was so largely modified by it. The question therefore, whether any gift is a gift of paraphernalia is to be determined now on the same principle as before that Act.

In the case of *Graham* v. *Londonderry* (1) a question arose before Lord Hardwicke as to various articles given to Lady Londonderry. Some of them were given to her by her father-in-law, Governor Pitt, before her marriage, some by the Regent of France during her marriage with Lord Londonderry. All these were held to be gifts to her separate use, as being given by strangers during the coverture. Lord Hardwicke further referred to several cases in which gifts of jewels and other property

(1) 3 Atk. 393.

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to a wife by a husband were held to be gifts to her separate use. But with regard to the diamonds in a necklace given by Lord to Lady Londonderry, he said: "This is not to be considered as a gift merely to the separate use of the wife. I have indeed admitted a husband may make such gifts; but where he expressly gives anything to a wife to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention." It was not, indeed, in this case necessary to decide whether these jewels were an absolute gift or paraphernalia, because in either case, as Lord Hardwicke points out, the plaintiff, Lady Londonderry's second husband, was entitled to them. But what is, I think, to be observed is that, although we do not know what the evidence before Lord Hardwicke was, by the words "when he expressly gives anything to a wife to be worn as ornaments of her person only," his Lordship would seem to be referring to some words, or act, shewing the husband's intention, and to indicate that some proof of the kind is necessary. In the case of *Northey* v. *Northey* (1), previously decided by Lord Hardwicke, there was evidence which pointed to a gift of paraphernalia, because it would seem that there the husband himself kept the jewels, and only sometimes permitted his wife to wear them.

In the case of *Jervoise* v. *Jervoise* (2) the husband bequeathed to his wife the use during her life of "all his jewels," and an annuity as well as some other property. There were certain family jewels which the wife had worn; some pearl ornaments had been given to her by her husband's aunt; and her husband had given her two diamond bracelets. It was held that the family jewels did not pass to the wife either to her separate use or as paraphernalia. It would appear, therefore, that, as the will could operate on them, it was not material whether the pearls and bracelets belonged to the wife to her separate use or as paraphernalia. It was, however, no doubt decided that both the pearls and the diamond bracelets were paraphernalia. With

(1) 2 Atk. 77.

(2) 17 Beav. 566.

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regard to the pearls, I feel a difficulty in reconciling the decision of the learned judge on what was, as I have said, not a material point, with the rule laid down by Lord Hardwicke, that articles cannot be paraphernalia which come from a stranger during the coverture. But, as regards the bracelets, there was evidence on which it might well be held that they were paraphernalia. They were not given by the husband on any particular occasion, but were rather given to be worn, as they were, with the family jewels, though not necessarily to become themselves family jewels, and one bracelet was given to match the other. "The husband," the Master of the Rolls said, "evidently bought them for the purpose of adorning his wife."

In the present case the evidence seems to me to point to a different conclusion. Clearly, most, if not all, the jewels were Christmas or birthday presents, or were peace-offerings in the sense I have referred to. Jewellery liable at any moment to be reclaimed would not make a very graceful or grateful offering; and I see nothing to shew that the husband intended to impress the character of paraphernalia on his gifts.

The case of *In re Vansittart, Ex parte Brown* (1) was referred to by the counsel for the husband as shewing the legal effect of a gift of jewels from a husband to a wife. In that case it was held that such a gift was a settlement within s. 47 of the Bankruptcy Act, 1883, on the ground that the donor contemplated the retention by his wife of the present that he gave her. But the inference which I draw from that case is the reverse of that suggested to me. It may well be that a voluntary settlement, voidable by creditors, was created, because the jewels were given, not as small sums of money might be given for immediate expenditure, but to constitute a permanent possession of the wife. But the jewels became the property of the wife, and no doubt she could have given a good title had she sold them. And, therefore, the inference drawn by the learned judge from the facts, which, as to the occasions of the gifts, were very like those in the present case, was not that the wife took the jewels as paraphernalia, but rather as settled to her separate use. Indeed, it does not seem to have occurred to any one to think of paraphernalia in connection with

(1) [1893] 1 Q. B. 181.

the case, though such a view would have been conclusive in favour of the creditors.

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I think, therefore, that the jewels in this case belong to the wife, and that the husband's claim fails.

Solicitors: *Hawks, Stokes, & McKewan; E. Hutchinson.*

H. D. W.

CHURCHWARD *v.* CHURCHWARD AND HOLLIDAY (THE QUEEN'S PROCTOR INTERVENING).

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Nov. 8, 9, 21.

Divorce—Collusion—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 30 —*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *ss.* 5, 7.

If the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld.

The petitioner made an agreement with the respondent, who had committed adultery with the co-respondent, by which she undertook to settle money on the child of the marriage, and he to take proceedings for divorce, which she was not to defend and of which she was to pay the costs, he not claiming damages against the co-respondent. The agreement was disclosed to the Court. The petitioner did not connive at the adultery, and no false testimony was adduced before the Court in proof of it. It was not shewn that there were any specific facts, material to defence or recrimination, which might have been brought forward by the respondent; but it was not proved that there were no material facts which she might have brought forward by way of defence or recrimination:—

Held, on the intervention of the Queen's Proctor, that the agreement constituted collusion between the petitioner and the respondent, so as to disentitle the petitioner to a divorce.

INTERVENTION of the Queen's Proctor on the ground of alleged collusion between the petitioner and the respondent. The following statement of the facts is taken from the judgment.

In this case the husband petitioned for a divorce, on the ground of his wife's adultery with the co-respondent. There was no defence, either by the respondent or the co-respondent, and at the hearing the adultery was clearly proved. I therefore granted a decree nisi; but, as the counsel for the petitioner gave me information of an agreement between the petitioner and the respondent, and of correspondence between their solicitors,

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I thought it right to direct that the papers should be laid before the Queen's Proctor, in order that he might intervene if he should be so advised. He has intervened, alleging collusion between the petitioner and respondent.

With the exception of some evidence taken at the hearing of the intervention, the whole of the evidence consists of the agreement, of certain correspondence, and of the diary, or notes, of the petitioner's solicitor. I think, therefore, that it must be taken that, substantially, all the materials affording evidence of collusion were disclosed and offered to me at the trial of the petition by the petitioner's counsel.

The material facts are as follows. On June 4, 1893, the respondent left her home, no doubt accompanied, or soon afterwards joined, by the co-respondent. On the 5th she telegraphed to her husband's sister that she had left home for good. On the 6th she wrote a letter to her husband containing the following passages: "You are not surprised, I presume, at my leaving you. It had preyed on my mind for some time past, the fact that you did not want me; and that your opinion was that Poppie would be better looked after without me; and that everything I did was wrong. You have so often, over a mere trifle, told me 'to go'; and I have now done so; and I need not remind you of all the cruel things you have said to me since Poppie's birth." On June 10 she wrote: "From your telegram received yesterday" (this telegram was not produced) "you do not seem to realize the position. I would willingly spare your feelings; but it is far better frankly to tell the truth that I have not left home alone. It is a source of trouble to me to think that poor little Poppie is worrying for me; but you should have thought of this before you so many, many times have told me to go. After all that has occurred, it is impossible for me ever to return, or matters to be mended. You had far better proceed with a divorce against me. . . . Had you only been different these last three-and-a-half years (which you admit in your telegram), things would not be as they are." At that time, or at latest by June 14, the petitioner was aware that the respondent and co-respondent were living together.

It was stated by the petitioner's solicitor, Mr. King, that before

June 19, the petitioner informed him, as a friend, of what had happened, and expressed a wish to sue for a divorce. There is no entry of this in Mr. King's notes for his bill of costs, the first entry of which is under the date of June 19. On that day the respondent's solicitors, Messrs. Chester & Co., wrote to the petitioner's solicitors for an appointment that afternoon. In Mr. King's notes the following entry occurs: "June 19.—Attending Messrs. Chester, who represented Mrs. Churchward, upon their call discussing this matter very fully with them, and explaining the position of the matter, and that Mr. Churchward was disposed to act in a reasonable way with regard to Mrs. Churchward's clothes and securities, provided he was fairly met, and we were, after conferring with you, to endeavour to make some proposal with a view to a settlement. Afterwards attending you, discussing matter very fully, informing you result of our interview with Messrs. Chester, and the admissions they were prepared to make, and conferring particularly as to taking proceedings in the Divorce Court, which under our advice you declined to do, at any rate for the present, and you requested us to see Messrs. Chester to-morrow and make the best arrangement we could by way of settlement for the benefit of the child."

Mrs. Churchward was possessed of about 2600*l.* in various investments, and also of a reversion expectant on the death of her father in about 1600*l.* This property was at her disposal, and could, of course, at any time have been expended or given away by her; and it must have been obvious that she might not improbably either give it to the co-respondent, or, if she could marry him, settle it on herself and him. Under date of June 20, in Mr. King's notes occurs this entry: "Attending Messrs. Chester, discussing matters fully, when we stated that you would be prepared to accept a scheme by which the whole of Mrs. Churchward's property should be settled for her exclusive benefit for her life, 2000*l.* on her death to be held in trust for the benefit of the child, and they promised to see her on the matter. Attending you in the evening, discussing matter very fully with you, and agreeing as to course to be taken, and you gave us certain information which rendered it impracticable for any divorce proceedings to be for the benefit of Mrs. Churchward,

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and agreeing to see Messrs. Chester again to-morrow." The information referred to in the above note was that Mr. Holliday was already married, which, however, was soon after discovered not to be the case. Under date of June 21, Mr. King has the following note: "Attending Messrs. Chester, giving them particulars of information you had obtained with reference to Mr. Holliday, discussing matter further with them, when they stated that they had seen Mrs. Churchward, and that she was prepared to make some reasonable settlement of her property, which they strongly advised her to do for her own protection": and under date of the 22nd: "Attending Mr. Churchward, discussing this matter very fully with him, when we ultimately agreed the terms to be proposed to Messrs. Chester with a view of settling this matter, and discussing the same fully." On June 22 the petitioner's solicitors wrote to the respondent's solicitors proposing certain terms. They were, so far as is material, that the 2600*l.* belonging to his wife was to be settled, she to have a life interest in it, with reversion, as to 500*l.*, to the child of the petitioner and respondent, and power of appointment by will over the remainder; that, of the 1600*l.* in reversion, 1000*l.* should after the respondent's death, go to the child, if then living, otherwise this reversionary interest to belong to the respondent; and that, if desired, a deed of separation should be executed. At that time the petitioner's solicitors and the petitioner believed the co-respondent to be married. On June 24 the respondent's solicitors wrote: "We do not for a moment suppose your proposals will be accepted in their entirety, but we shall advise that a proper settlement be made if you meet us in other ways, and, when we last saw the parties, there was a distinct disposition to accept our advice in that respect." This was followed by a letter from the respondent's solicitors on the 26th, in which the terms proposed are accepted, with modifications, and the following words follow: "The whole of the above suggestions are, however, contingent on this further term—viz., that Mr. Churchward at once commences and uses all due diligence to obtain a divorce, so as to enable Mrs. Churchward to marry Mr. Holliday as early as may be practicable."

Under date of June 27 Mr. King's notes state: "Attending

Mr. Churchward, discussing the matter with him, but he declined to accede to the proposal, and insisted on some better terms being made for the benefit of the child": and under date of the 28th: "Attending Mr. Griffithes, discussing this matter fully with him, and we informed him that you were not disposed to accept the proposal made, or any other which did not make satisfactory provision for the child, and until such terms were arranged we could not discuss the question of divorce, and we made a counter-proposal . . . and they were to see their client further upon it." On June 29 the respondent's solicitors wrote to the petitioner's solicitors, modifying the pecuniary proposals, and adding: "This is the very best we can do, and we believe, if it be not accepted, we shall have peremptory instructions to at once issue a summons that the property be made over to Mrs. Churchward." On July 3 it appears from Mr. King's note that Mr. Churchward "declined to take any proceedings until the terms were finally agreed on," and on the same day the petitioner's solicitors wrote: "With regard to the proceedings" (for a divorce) "our client will be prepared to act on your suggestion after settlement of the above matters, provided he be fully indemnified against all costs by a sum of money to be agreed on being deposited." On July 4 the respondent's solicitors, after referring to the pecuniary terms of the proposed settlement, wrote: "We do not think there is anything else in your letter to which any objection will be taken . . . and we think the matter of costs of suit may be met by a deposit of 50*l.* in joint names, the deed of settlement containing a proviso that, unless within twelve months from its date Mr. Churchward obtains a decree absolute, Mrs. Churchward may at her option avoid the deed. We think this proviso should be inserted, because we feel some fear that if the arrangement came to light, we might have trouble with the Queen's Proctor, and, although we are of opinion that the contemplated arrangement would not enable him successfully to intervene, it is quite possible a jury, at his instance, might take an adverse view."

Some further discussion took place between the petitioner's and respondent's solicitors, but on July 11 the latter sent to the former draft terms of agreement. The terms of this agreement

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as to the divorce proceedings appear from a letter composed by the petitioner's and respondent's solicitors jointly, and sent to counsel, in consequence of the strong objection of the petitioner's solicitors to any reference to the divorce proceedings. That letter, dated July 17, contained this passage:—"We are instructed in a matter between husband and wife, where the latter is now living in adultery, and terms are being arranged as to the wife's property, which at present remains in the physical custody of the husband. In these circumstances we, acting for the wife, have suggested that, in consideration of certain things to be done by the wife, the husband shall covenant at once to sue for a divorce, and prosecute his suit to completion, claiming no damages against the co-respondent, and the wife and co-respondent agreeing not to defend, and the husband agreeing to these terms on condition that the sum of 100*l.* is secured in the joint names of the solicitors in the case, to cover his costs." Counsel, thereupon, advised:—"I am of opinion that the proposed arrangement is, if not actually collusion, liable to the suspicion of collusion, and would, therefore, endanger the husband's decree, and I think his solicitor is very wise in refusing to enter into it. I do not think the terms as to costs so objectionable as the agreement not to defend. The wife and co-respondent may or may not have a good defence; if they have, such an agreement is, of course, ipso facto, collusion; and, if they have not, I do not see the necessity for any such agreement, and, if the Queen's Proctor intervened, the husband would have considerable difficulty in inducing the Court to believe that he did not enter into the agreement for the purpose of suppressing facts, which he would prefer were not brought to the knowledge of the Court." It was admitted by the petitioner's solicitor, in evidence given at the hearing of the intervention, that the terms of agreement stated in the letter to counsel represented the agreement then and now existing between the parties. An endeavour was made by the petitioner's solicitors in a letter, dated July 20, to leave the agreement as to divorce on an understanding; but eventually two agreements were settled and signed by the husband and wife on August 25, one settling the wife's property to some extent for the benefit of the child, and the other in the following

terms, which, it will be seen, do not specifically provide for no defence being made to the suit.

"Whereas the said J. S. Churchward is entitled to a decree for dissolution of marriage against his wife, the said F. E. G. Churchward, with W. J. Holliday as co-respondent; and whereas in consideration of other terms of arrangement this day signed between the said parties hereto, they have agreed to the further terms hereinafter contained; and whereas the sum of 100*l.*, money belonging to the said F. E. G. Churchward, has been deposited in the London and Joint Stock Bank, Chancery-lane branch, in the joint names of Mr. King and Mr. Griffithes, the respective solicitors of Mr. Churchward and Mrs. Churchward, for the purposes hereinafter mentioned; now, it is hereby agreed as follows:—

"1. The said J. S. Churchward shall forthwith institute and prosecute, with all due diligence, a suit for divorce against the said F. E. G. Churchward as respondent and the said W. J. Holliday as co-respondent, without any claim for damages against the said co-respondent.

"2. The taxed costs of the said J. S. Churchward of such suit, to be paid out of the 100*l.* deposited as aforesaid, upon a decree absolute being made within fifteen calendar months of the date hereof, and subject thereto the said 100*l.* shall belong to the said F. E. G. Churchward."

On August 7 Mr. Churchward wrote to his solicitor in these terms: "I think this week is the only chance before the Long Vacation of filing a petition, and I shall feel much more comfortable when it is done . . . . Please hasten the petition." At this time the terms of the arrangement were settled, except a question as to the persons to be named as trustees. It would appear, from an entry of October 21, that the petitioner's solicitors felt difficulties as to presenting a petition, but on November 1 this was done.

Inderwick, Q.C., and *Guy Stephenson*, for the Queen's Proctor. The evidence shews collusion. The decree must be taken to have been obtained by the petitioner and the respondent acting in concert. She agreed with the petitioner to settle money on the child and to pay the costs of the proceedings, if he would

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divorce her without claiming damages against the co-respondent, whom she wished to marry. The House of Lords would have held such an agreement to be collusive: see Standing Order 142 (Macqueen's House of Lords' Practice, 528, 791), and *Chisim's, Edwards'*, and *George's Cases* (1). The decisions of the full Court in *Midgley* v. *Wood* (2) and *Lloyd* v. *Lloyd and Chichester* (3) are to the same effect.

Lawson Walton, Q.C., and *R. H. Pritchard*, for the petitioner. The collusion which the Queen's Proctor has to prove is "collusion for the purpose of obtaining a divorce contrary to the justice of the case" within s. 7 of the Act of 1860. There is no evidence of such collusion. The petitioner was entitled to a divorce from the respondent. This being so, he and she put themselves into the hands of their solicitors. The result was an arrangement by which scandal and expense were avoided, and a settlement for the child secured. Such arrangements are common and useful. In order to constitute collusion, there must be some plot to lay a false case before the Court. This was not the case here, and the arrangement was itself disclosed. The cases in the House of Lords are not binding on the Court. The view that a bonâ fide agreement between an innocent and a guilty person to obtain a divorce is not collusion, is, it is contended, taken by Lord Stowell in *Crewe* v. *Crewe* (4), by Dr. Lushington and the Lord Advocate of Scotland in their answers before the Select Committee of the House of Lords in 1844 (5), by Lord Chelmsford in *Shaw* v. *Gould* (6), and by Lord Hannen in *Hunt* v. *Hunt*. (7)

Inderwick, Q.C., in reply.

Cur. adv. vult.

THE PRESIDENT (after stating the facts as above) continued as follows:—

From the evidence before me I draw the following conclu-

(1) Macqueen's House of Lords' Practice, 582, 583, 661.
(2) 30 L. J. (P. M. & A.) 57.
(3) 30 L. J. (P. M. & A.) 97.
(4) 3 Hagg. 123, at p. 129.
(5) See the First Report of the "Commissioners appointed to Inquire into the Present State of the Law of Divorce," published in 1853 by Messrs. Bradbury & Evans, pp. 35, 59.
(6) Law Rep. 3 H. L. 55, at pp. 77, 78.
(7) 47 L. J. (Prob.) 22.

sions:—1. That the respondent and co-respondent were guilty of adultery.

2. That the petitioner did not connive at such adultery.

3. That there was no collusion to present to the Court false facts in proof of adultery.

4. That the petition was presented in accordance with, and in consequence of, the agreement come to between the parties. By this I mean that the petitioner would have been content with a separation, could he so have obtained the pecuniary settlement he sought; and he would not have presented the petition, if he could not have secured himself against the risk of his wife's property being diverted from his child. It was strongly urged on me, that the petitioner would in any case have presented a petition for a divorce; and that the unwillingness exhibited to the respondent's solicitor was a justifiable stratagem to secure a favourable settlement; and the letter of August 7 was relied on in support of the contention. I cannot accept this view.

5. That it was in fact part of the agreement that the wife and co-respondent should not defend the suit.

6. That it was not shewn that there were any specific facts, material to defence or recrimination, which might have been brought forward by the wife. But it appears to me impossible to say, especially having regard to the wife's letters of June 6 and 10, that it was proved that there were no material facts, which she could have brought forward, by way of defence or recrimination. The petitioner, the petitioner's solicitors, and the respondent's solicitors denied that they knew of any such facts; but such statements cannot, I think, be taken to be conclusive on the point.

The question is whether, under these circumstances, the claim of the petitioner for a divorce should be dismissed, by reason of his collusion with the respondent.

It was contended by Mr. Lawson Walton, in his very able argument for the petitioner, that the collusion necessary to be shewn was that described in the latter part of s. 7 of the Act of 1860, as "collusion for the purpose of obtaining a divorce contrary to the justice of the case," and he drew a distinction between such collusion and that referred to in s. 30 of the Act of

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1857. It is, however, to be observed that the intervention of the Queen's Proctor is not under the latter, but under the earlier part of s. 7, where the phrase is simply "collusion." But the point is not very material, because, as an alternative, Mr. Walton urged —and this was indeed the real gist of his argument—that collusion meant, in both cases, collusion for the purpose of obtaining a divorce contrary to the justice of the case, in a sense presently to be mentioned, which he ascribed to the words. Whatever the meaning of collusion, I cannot doubt that it bears the same meaning in s. 30 of the Act of 1857, and in both parts of s. 7 of the Act of 1860. It seems to me impossible to suppose that a totally different sense is to be assigned to the collusion which vitiates a claim for divorce, if discovered by the judge at the trial, before a decree nisi is pronounced, and that brought to his knowledge by the Queen's Proctor before or after such decree.

The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it was urged that collusion is agreement either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the Court granting a divorce. It was insisted that, in a suit against a wife, unless it be shewn that the petitioner's charge of adultery was in fact unfounded, or was supported by false evidence, or that material facts in support of defence or recrimination were concealed, there can be no collusion. On the other hand, it was maintained that collusion has a wider scope, and that if there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and, a fortiori, if such agreement contains terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shewn that adultery was not in fact committed, or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shewn to have been concealed. There would seem, therefore, to be four questions that may be asked. First, is it collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms

of its conduct, by agreement, though there be no express stipulation that there shall be no defence, and no specific ground for suspicion that a false case is put forward or material facts concealed? Secondly, does the addition of a term that there shall be no defence render such an agreement collusion? Thirdly, is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed? Or, fourthly, is there collusion only when it is shewn that, in consequence of such an agreement, false matter has been introduced into the case or material facts suppressed?

In support of the more limited view of the nature of collusion reliance was placed on definitions which, at various times, and with more or less authority, have been given of collusion.

Mr. Macqueen in his book on Divorce (2nd edition, p. 67), summarizes the matter thus: "According to the authorities there appear to be two kinds of collusion. First, where the parties put forward false facts to form the basis of the judgment. Secondly, where the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted, to form the basis of the judgment." This definition is, however, obviously incomplete in omitting the suppression of material facts of defence or recrimination as one kind of collusion; and it therefore shuts out the further consideration which arises, if it be admitted that such suppression does constitute collusion, namely, whether it must be shewn that material facts were in fact concealed. It is remarkable that the learned author goes on to mention *Chisim's Case* (1) in the House of Lords, without apparently noticing, as I shall presently remark, what an extension to collusion this case appears to afford.

In *Crewe* v. *Crewe* (2) Lord Stowell said: "Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect

(1) Macqueen on Divorce, 2nd ed. p. 76; Macqueen's House of Lords' Practice, 583.

(2) 3 Hagg. 123, at p. 129.

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their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law, therefore, requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult to prove, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it; for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released, because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncontrolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it. It has been often said, and with peculiar injustice, that, although the original adultery was not collusive, yet the proceedings in these courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law: the Canon (1) directs that a divorce shall not go upon the mere confession of the party; the wife, therefore, must give a negative issue (indeed, the Court is almost bound to reject an affirmative issue, since it is necessary, by the Canon,

(1) i.e., the 105th Canon, which is as follows: "Forasmuch as Matrimonial Causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in Judgment, especially in causes wherein matrimony, having been in the Church duly solemnized, is required upon any suggestion or pretext whatever to be Dissolved or Annulled: We do strictly Charge and Injoin, that in all proceedings to Divorce and Nullities of Matrimony, good Circumspection and Advice be used, and that the Truth may (as far as possible) be sifted out by the Deposition of Witnesses, and other lawful Proofs and Evictions, and that Credit be not given to the sole Confession of the Parties themselves, howsoever taken upon Oath, either within or without the Court." See Burns' Ecclesiastical Law, 9th ed. Appendix II. p. 660.

that evidence should be produced); she must deny her guilt, and her prayer must be according to her denial; but this is mere style and form. If the Court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is, whether the husband has received a real injury, and bonâ fide seeks relief."

I think that in this passage Lord Stowell was considering, as indeed he says, only the view of the matter applicable to the case before him. It is, no doubt, collusion, where there is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. But here, again, there is omitted, because in this case not relevant, the kind of collusion which results from suppression. It is to be observed, however, how carefully Lord Stowell limits the case in which he excludes collusion, to that of a mere desire of both parties to obtain a separation, and does not deal with the results of such a common desire leading to an agreement relative to the suit, still less with those of the desire on the part of the husband being induced by extraneous considerations offered by the wife; and it is to be observed, further, that Lord Stowell insists that the husband must have received a real injury and be seeking relief bonâ fide. This leaves open the question, in what cases is relief sought bonâ fide?

Great reliance was placed by Mr. Lawson Walton on the definitions of collusion given by Dr. Lushington and the Lord Advocate of Scotland before the Select Committee of the House of Lords in 1844, which are appended to the Report of the Royal Commission appointed in 1850. (1) I therefore refer to them, though they are extra-judicial opinions. Dr. Lushington said (Report, pp. 47, 48): "190. A question was put to me as to collusion. Now I beg leave to observe that, in the sense in which it is used in Doctors' Commons, it does not mean even consent or facility, where there is just cause for the husband prosecuting the suit, or vice versâ, but it is permitting a false case to be substantiated, or keeping back a

(1) See the First Report of the "Commissioners appointed to Inquire into the Present State of the Law of Divorce," published in 1853 by Messrs. Bradbury & Evans.

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just defence. It may be a question whether this rule of collusion extends to cases where recrimination, though practicable, is not resorted to. 191. Do you mean, by saying where recrimination is practicable and is not resorted to, that the collusion consists in the abstaining from recrimination?—Yes; but I do not say that so doing has been deemed to be collusion in the legal sense of the word. . . . 194. Then do you understand that wherever there is a case where the fact of adultery, cruelty, and so forth, exists, provided that fact is not got up for the purpose of the proceeding, it would not be a case of collusion, though the parties were in collusion as to the proceeding in Court?—Certainly, we should not call it collusion; on the contrary, the expressions which have fallen from the learned judges have been these, and I think they are founded in truth: 'Why, if the wife has already committed the greatest possible offence against the husband by violating his bed, why should she add to it by increasing the expense of the remedy?' 195. Are you not aware that, to a certain degree, the same principle holds with Divorce Bills, for that, if the wife does not make any defence, which is the case in a great majority of those bills, it is reckoned no proof of collusion?—Certainly. 196. And so if the paramour makes no defence to the action, and lets judgment go by default, it is no proof of collusion?—Certainly." It is, I think, obvious that Dr. Lushington chiefly desired to insist that the mere abstention from defence did not constitute collusion; and that the case was not presented to his mind of an agreement between the parties providing for the bringing of a suit and for the terms on which it was to be conducted, including a stipulation that there should be no defence, and of the inference to be drawn from such an agreement.

The following questions were put to the Lord Advocate of Scotland, and the following answers given by him (Report, p. 63): "93. Would it be collusion, if the party had actually committed adultery without any collusion, and if then the other party and the adulterous party were colluding together to get a divorce?—That is, I believe, an interpretation pretty generally put upon it. My own impression is that such is not the true meaning of collusion. I mean that if a just cause for a divorce exists without

collusion, and the party wronged seeks to have the remedy of divorce, and is entitled to it, I doubt if the circumstance that the other party has no objection, or is well pleased, would be such collusion as to preclude the remedy. 94. So that if adultery had really been committed, not for the purpose of getting a divorce, but independently of that, it would be no collusion such as to bar the remedy, if the parties entered into a sort of plan for getting a divorce grounded upon that adultery?—I think that, according to the original meaning of collusion, it would not be so; but if you were to examine them very strictly as to whether they had any collusion in bringing the suit, what would be the effect of the parties admitting that they knew of the suit being intended to be brought, and that they had no objection to it, but that, on the contrary, they had allowed the writ to be served, and dispensed with the time, and afforded other facilities, I cannot say." It is clear that the Lord Advocate expressly abstained from pronouncing an opinion on circumstances in some respects similar to those in the present case. It should, however, be added that a little later he expressed the view that the mere circumstance of people going to Scotland to be divorced, as they might go to be married, would not constitute collusion. (1) It is not necessary to say more on that point than that the mere agreement to do what is necessary to give jurisdiction falls far short of the agreement in this case.

Mr. Lawson Walton further relied on the expressions used by Lord Chelmsford in the case of *Shaw* v. *Gould* (2), which are, no doubt, of great weight, though they were not necessary for the decision of the case. The facts, as well as his Lordship's view, can be gathered from his words. They are as follows: "But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch Courts to dissolve English marriages, the validity of the divorce of the appellants' mother from Buxton cannot be admitted, if it was obtained by concert or collusion. It was argued for the appellants that the only collusion which can affect the validity of a divorce is, where there are concert and connivance in the acts upon which the decree proceeds; and that, if a just cause of divorce exists without collusion, any

(1) Answer 99, p. 63.

(2) Law Rep. 3 H. L. 55, at pp. 77, 78.

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arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable. I quite agree that if the agreement in this case had been that Buxton should bring himself within reach of the Scotch Court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon attaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should "by himself, or by any one through him, give information which should be prejudicial to the divorce." Such an agreement as this appears to me to come within the very words of the oath de calumniâ, which was required to be taken by Mrs. Buxton, by which she swore "that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him; nor did she know, believe, or suspect that there had been any concert or agreement between any other person on her behalf, and the said defender or any other person on his behalf, with the view or for the purpose of obtaining such divorce." It is impossible to doubt that the disclosure to the Court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to receive if he had given information about it." It would appear, therefore, to have been Lord Chelmsford's opinion first, that the agreement by a respondent to come within Scotch jurisdiction for the purpose of a divorce being obtained against him, although accompanied by a stipulation that he should receive a certain sum when the divorce was obtained, did not constitute collusion; and secondly, that the addition of a term

that he should forfeit the money if he gave information prejudicial to the divorce did amount to collusion, because the disclosure to the Court of the agreement might have been prejudicial to the divorce. Lord Westbury also (at p. 87) was of opinion that the decree was collusively obtained, but did not state on what grounds that opinion was based. An agreement to come within the jurisdiction in order that the suit might be brought would, no doubt, not constitute collusion. I venture, with all respect, to think that an agreement that the respondent should be paid if the suit succeeded was at least open to considerable doubt; and this must, it appears to me, have, in truth, been Lord Chelmsford's view, because he thought it collusion to agree, in effect, to conceal those stipulations, as their disclosure might be prejudicial to the divorce. But is not the agreement in this case substantially of the same character as that which Lords Chelmsford and Westbury condemned? Is not an agreement not to defend tantamount in effect to an agreement not to disclose anything prejudicial to the divorce? Although the present petitioner prudently and properly revealed his agreement with the respondent, it is clear that the respondent placed it, by agreement, out of her power to make such a disclosure, and, if so, that agreement became, like the agreement in *Shaw* v. *Gould* (1), collusion.

It was pressed strongly on me that in the case of *Hunt* v. *Hunt* (2) Lord Hannen lent the weight of his authority to the narrower view of collusion. In that case it was alleged that the petitioner had been guilty of conduct conducing to his wife's adultery, and that he induced her to refrain from defending the suit by promising not to press for costs against the co-respondent. It would appear that the jury thought that these allegations were well founded. If so, there was, beyond question, a collusive agreement to conceal facts not only material but conclusive. No doubt, however, the President is reported to have said, in summing up to the jury: "Now, collusion is this—if a party to a suit of this kind, by agreement with the other, procures the withdrawal from the notice of the Court of facts which are relevant

(1) Law Rep. 3 H. L. 55. (2) 47 L. J. (Prob.) 22.

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to the charge which is imputed to him or her, that is collusion." And he later asked the jury (1): "Were there facts that were pertinent and material, and such as ought properly to have been submitted to the Court or a jury, in order to enable them to determine one or other of the charges against the petitioner? Of course, that will depend on the answer you give to the first two questions I have put to you—namely, Was his conduct such as conduced to his wife's adultery? Did he habitually use foul and indecent language to her?" It should, I think, be added that, in suggesting the cases in which there would or would not be collusion, the President appears to have put as the test, whether the husband did or did not feel that the matters, for the concealment of which he stipulated, were relevant to the charge made against him. It would, no doubt, appear from portions of his summing-up, that Lord Hannen seemed to regard proof that decisive facts were concealed by agreement as necessary to make out collusion. But it is clear that Lord Hannen did not intend to insist on such facts being decisive, if they were material, because it would appear, from the case of *Bacon* v. *Bacon and Ashby* (2), decided shortly before *Hunt* v. *Hunt* (3), that he considered that agreement between the parties to withhold relevant evidence was one form of collusion; and also that the evidence need be relevant only and not decisive. The latter point is now established by the decision of the Court of Appeal in *Butler* v. *Butler* (4), which I recently followed in *Rogers* v. *Rogers*. (5) It must be remembered, also, that in a summing-up it is not necessary, or, indeed, desirable, to do more than state as much law as covers the case in hand; and I think that the view of Lord Hannen, expressed in his summing-up, ought not to be put higher than this, that, where the main evidence of collusion is an agreement not to defend, in order to find collusion you must see that it was intended to conceal material facts.

Giving, therefore, its full weight to the case of *Hunt* v. *Hunt* (3), it does not appear to me to conclude a case such as

(1) 47 L. J. (Prob.) 23.
(2) 25 W. R. 560.
(3) 47 L. J. (Prob.) 22.
(4) 15 P. D. 66.
(5) [1894] P. 161.

the present, where, though there is an agreement not to defend, there is so much more.

It is now necessary to consider the authorities relied on by the Queen's Proctor. They begin with decisions of the House of Lords before the Act of 1857. It was contended before me that these decisions were not binding in this Court. I am, however, clearly of opinion that they are authorities of the greatest weight. In *Shaw* v. *Gould* (1) Lord Westbury said: "In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but, until the recent Divorce Act, this law was administered by Parliament alone, and though the decision of Parliament was in the form of an Act, or privilegium, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative, act. The justice of divorce was recognised, but no forensic tribunal was entrusted with the power of applying the remedy. But the law and practice of Parliament were well known; and, in fact, this House acted as a Court of Justice." It may be added that those decisions of the House of Lords have been repeatedly recognised as authorities, and notably so, in a case I shall presently mention, by this Court. By its Standing Order of March 28, 1798, No. 142 (Macqueen's Practice of the House of Lords, pp. 528, 791) the House of Lords imposed on itself the duty of inquiring "whether there has or has not been any collusion, directly or indirectly, on the part of the petitioner relative to any act of adultery that may have been committed by his wife, or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentences of divorce had in the Ecclesiastical Court at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife." There can, I think, be no doubt that the provisions as to collusion in the Act of 1857

(1) Law Rep. 3 H. L. 55, at p. 84.

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were intended to continue the practice of the House of Lords in divorce cases. It is therefore all-important to see what the House of Lords considered collusion to be.

In *Chisim's Case* (1) it appeared that the costs of the plaintiff in the action of crim. con. were paid by the respondent's father, and also that in the Ecclesiastical Court no witnesses were called for the wife. The report states, "The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained." Now, it cannot possibly be said that in this case it was shewn that any specific material facts were concealed; and it is expressly stated that the adultery was proved. It seems to me, therefore, that no conclusion is possible except that the House of Lords considered collusion to be made out from the fact that the parties in the conduct of the proceedings were acting in concert. No doubt the inference was that where such concert existed it was impossible to be sure that all the truth was presented; but the point is that proof of concert in the conduct of the proceedings was held sufficient to engender such a doubt.

In *Edwards' Case* (2) the report states: "The evidence of adultery in this case was clear; but a bond signed by the petitioner, Thomas Edwards, was produced, dated December 10, 1778, securing payment of 45*l.* a year to his wife, Judith Edwards, who, on the other hand, "conditioned on her part, that she and all those who were or might become concerned for her in her defence to the said Thomas Edwards obtaining a divorce, would not give any unnecessary delay in the proceeding thereof, but in all things conform herself, and themselves, so as to bring the suit and proceedings to as speedy an issue as possible; yet, nevertheless, not so as to weaken any real defence that the said Judith might be able to make to the said proceedings, or the said Thomas Edwards obtaining his said divorce." The bill, after counsel had been heard as to the effect of this document, was rejected, and it was so treated, therefore, merely on proof that the parties had agreed there should be no defence, and this single fact was considered to establish collusion.

(1) Macqueen's House of Lords' Practice, 582.

(2) Macqueen's House of Lords' Practice, 583.

In *George's Case* (1) there were circumstances connected with a prior separation between the parties as to which the House was clearly not satisfied; but, besides this, great stress was laid on the fact that there had been a contract between the parties with respect to the verdict in the Ecclesiastical Court, and this seems to me to shew that, in the judgment of the House, that fact went far, if not the whole way, to establish collusion.

I now turn to the decisions of this Court. In the case of *Midgley* v. *Wood* (2), which was a case of nullity, Sir Cresswell Cresswell expressed his opinion that, in a suit for dissolution by reason of adultery, it would be collusion if the parties were to concur in getting up evidence of the case, though the case were a true one. The learned Judge Ordinary suggested that there might be a distinction in this respect in the case of a suit for nullity, where both parties might institute the suit, on the same grounds; and this appears to me to shew that the view of Sir Cresswell Cresswell was that collusion existed where one party, contrary to his or her apparent interest, was found acting in concert with the other in matters material to the suit.

The case of *Lloyd* v. *Lloyd and Chichester* (3), decided by the full Court, consisting of the Judge Ordinary, Wightman, J., and Byles, J., presents facts bearing very close resemblance to those in the present case. The adultery of the respondent, who had left her husband and was living with the co-respondent, was unquestionable. The Court stated that they did not find that the husband connived at or was accessory to the adultery; nor was any matrimonial misconduct imputed to him. But it was discovered by the Court that the petitioner had received money from the wife's father to induce him to proceed with the suit, there being ground to think that he fancied that a dissolution of the marriage would cause him to lose a reversionary interest under a settlement; that his costs in the suit were provided by the wife's father; that neither costs nor damages were to be demanded against the co-respondent; and that the wife's father and the co-respondent assisted in getting up the evidence, the former giving facilities for obtaining evidence by allowing his servants

(1) Macqueen's House of Lords' Practice, 661.

(2) 30 L. J. (P. M. & A.) 57.

(3) 30 L. J. (P. M. & A.) 97.

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to say what they knew, the latter giving money for this purpose to an agent sent by the husband to Paris, where the respondent and co-respondent were residing. The Court, referring to *Chisim's Case* (1), held that the appearance of collusion in the case was too gross and palpable for any Court to overlook it. The material elements in that case, of the petitioner receiving consideration to prosecute the suit, and having his costs secured, are present in this. It is true that, in that case, the parties acted together to get up the evidence, whereas in this case that was not done, because it was unnecessary. But what is material is that, no more in that case than in this, was it suggested that there were any false facts put forward or any material facts concealed. The utmost that can be said is that the Court had before it parties not independent, but acting throughout in concert; and the principle to be gathered from that case appears to be that, under such circumstances, the Court is forced to believe that it is being misled, or, at any rate, that it can feel no assurance that it is not.

In the face of these two cases I think it impossible to say that in *Jessop* v. *Jessop* (2), decided shortly after them, in 1861, Sir Cresswell Cresswell intended to limit collusion to cases in which the agreement was to keep back evidence of a good answer, or to set up a false case; nor do I think his words as to the particulars required, in his summing-up to the jury, bear such a meaning. In *Gethin* v. *Gethin* (3), decided later in 1861, I am inclined to think that Sir Cresswell Cresswell intended to express an opinion that, if it were shewn that a husband, who was respondent, withdrew charges against his wife and made no defence, not acting independently but in pursuance of an agreement, that would constitute collusion. It is true, however, that in that case there was ground for suggesting that the wife had been guilty of adultery, though the jury found she had not; but it cannot be said that there was any concealment of the case as to adultery, because, in fact, the husband had previously filed and abandoned a petition. I am not sure, however, that this case leads

(1) Macqueen's House of Lords' Practice, 582.

(2) 9 W. R. 640; 30 L. J. (Prob.) 193.

(3) 31 L. J. (P. M. & A.) 43.

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to any clear conclusion. Nor do I attach much importance to the case of *Harris* v. *Harris and Lambert* (1), in which it appeared that the respondent had assisted the petitioner's case by facilitating proof of identification, and Sir Cresswell Cresswell said: "Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion." I will only say that I do not think that this case in any way militates against the view more fully expressed by that learned judge in other cases I have mentioned. Probably the learned judge thought that the concert between the parties did not amount to collusion, because it did not involve matter sufficiently material to the issue of the suit.

The case of *Barnes* v. *Barnes and Grimwade* (2), decided in 1867 by Lord Penzance, is not so strong an authority as *Lloyd* v. *Lloyd and Chichester* (3), because in *Barnes* v. *Barnes and Grimwade* (2) the husband induced the wife, for a consideration, not to oppose; but there were, no doubt, some facts brought to light which, if disclosed to the Court, might have induced it to refuse the decree. Still, the words of Lord Penzance appear to me to indicate that his view of collusion did not differ from that of Sir Cresswell Cresswell. His Lordship said: "I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation, to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery. With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance while a suit is pending, in order to save the expense of an application to the Court for alimony. If that evidence stood alone I should hold that it was not sufficient to prove the charge of collusion; but the evidence goes much further. It amounts in substance to this—that the

(1) 31 L. J. (P. M. & A.) 160. (2) Law Rep. 1 P. & D. 505.
(3) 30 L. J. (P. M. & A.) 97.

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petitioner said to the respondent, 'If you do not oppose I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.' If that is not collusion, I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not as far as her own adultery is concerned. But if she had brought to the knowledge of the Court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the Court would have granted a decree. For these reasons I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established." I have quoted the whole of the learned judge's judgment, because, taken as a whole, it seems to me to shew that from the agreement not to defend alone he would have inferred collusion.

On the whole, it appears to me that the authority of the House of Lords, as shewn by its practice, and of Sir Cresswell Cresswell, as well as of Byles and Wightman, JJ., is decidedly in favour of the position that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with, or withheld; and I do not think that the authority of Lord Stowell, Dr. Lushington, Lord Penzance, or, though no doubt this is less clear, of Lord Hannen, can be invoked in favour of a contrary opinion.

It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot, however much the parties to it may otherwise desire, be altered, except on the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought. Hence, it arises that in matrimonial proceedings, this Court has imposed on it, by the previous practice, and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the petitioner's claim.

I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decisions of the House of Lords, and of the Acts of 1857 and 1860, may not be that, when the parties to a suit are acting in complete concert, the Court is deprived of the security for eliciting the whole truth, afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in s. 7 of the Act of 1860, "collusion for obtaining a divorce contrary to the justice of the case," may be understood to indicate that, by such an agreement, justice is imperilled, but not to require that it must be affirmatively shewn that, having regard only to the matrimonial conduct of the parties, justice will not be, or has not been, done. No doubt the protection to the Court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the Court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem duello miscuit.* He appears before the Court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stowell, "he has received a real injury and bonâ fide seeks relief."

In the present case, being of opinion, as I have said, that the initiation of the suit was procured and its results as to costs and damages settled by agreement, I think it must be held that there was collusion. If it be necessary to constitute collusion that there should be a compact not to defend, that also was present in this instance. Further, if it be needful that suspicion

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of the concealment of some facts be entertained, I entertain suspicion (I do not wish to say more) as to the facts of the husband's conduct from the expressions used by the wife in her letters. But I do not think it has been shewn, nor in my opinion need it, that any specific facts of a material character exist which might have been brought before the Court.

I was much pressed by counsel with the hardship on the petitioner of dismissing his petition and of rendering the agreement of no effect. But I cannot assent to this view. As regards freedom from an adulterous wife, if the petitioner desires that, for its own sake, I see nothing to prevent his filing a petition without agreement with her. As regards the obtaining pecuniary advantage, for himself or his child, I must say that a divorce suit ought not, in my judgment, to be made the stipulated price of any pecuniary consideration.

The intervention of the Queen's Proctor must, therefore, succeed; but there will be no order as to costs. I was pressed to say that the disclosure of the agreement at the trial negatived collusion. I cannot follow that suggestion, because confession is not a defence. But I think that the conduct of the petitioner, in making this disclosure, entitles him to favourable consideration as to costs.

Solicitors: *Solicitor to the Treasury; King, Wigg & Co.*

H. D. W.

[DIVISIONAL COURT.]

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Nov. 6, 7.

THE ARGO.

Admiralty—Salvage—Practice—Affidavit of Value—Appraisement—Evidence of Value—Tender—County Court Rules, 1892, *Order* XXXIX. *B*, *rr.* 30, 31, *and* 32—*Costs.*

Under Order XXXIX. B of the County Court Rules, 1892 (rule 31) the property in an Admiralty action for salvage will not be released, except with the consent of the plaintiff, until its value has been agreed, or an affidavit of value filed on behalf of the party seeking the release, and (rule 32) if the plaintiff is dissatisfied with the value mentioned in the affidavit, he is entitled to have the value ascertained by appraisement.

In an action of salvage in a county court, the defendants tendered and paid into Court 75*l.*, and filed an affidavit, putting the value of their smack, salved by the plaintiffs, at 140*l.*, and the cargo of fish at 42*l.* 15*s.*

The plaintiffs by letter objected to the value, but did not apply for an appraisement, and, at the trial, tendered evidence putting a higher value on the smack. The county court judge held that he was bound to admit the evidence, and fixed the value of the smack at 272*l.*, and the fish salved at 48*l.*, making 320*l.*, and he made an award of 80*l.* (to include the 75*l.* in Court), being 40*l.* or one-eighth for salvage, and 40*l.* for loss of fishing on the part of the plaintiffs' vessel.

The defendants appealed.

Held, by the Divisional Court (Sir F. H. Jeune, President, and Bruce, J.), that, under rule 32, the plaintiffs, if dissatisfied with the value given in the affidavit, had a right of appraisement for the purpose of determining what the value of the res should be taken to be at the trial, so as to avoid the expense of calling experts, and also that the defendants might thereby have a value on which to tender. Secondly, that the tender must be upheld, as, in the exercise of the discretion, which the county court judge ought to have exercised, the evidence was, in the circumstances, inadmissible, and the affidavit of value conclusive.

APPEAL by defendants in an action of salvage against an award of the judge of the county court of Yorkshire, holden at Kingston-upon-Hull.

On November 11, 1893, the owners, master, and crew of the steam trawler *Retriever*, instituted an action for salvage in the county court, in the sum of 150*l.*, against the owners and parties interested in the smack *Argo*, her cargo and freight. On November 15, the owners of the *Argo*, as defendants, gave notice of tender and paid 75*l.* into court, in settlement of the claim of

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the plaintiffs, but without costs, the amount having been tendered before action.

On November 20 the defendants filed an affidavit, putting the value of the *Argo* in her damaged condition at 140*l.*, and of the fish on board at 42*l.* 15*s.* On November 22 the plaintiffs' solicitors wrote to the defendants' solicitors, "We have received affidavit. You cannot expect us to accept your affidavit as to value"; and, on the same day, the defendants' solicitors wrote to the plaintiffs' solicitors, "Our estimate is ample. If you intend to dispute this at the trial, we must ask you to give us notice that we may be ready at the trial."

No formal notice was given, but on the hearing of the case, on January 22, 1894, the plaintiffs tendered evidence of the value of the smack. The defendants objected on the ground that if the plaintiffs were dissatisfied with the value mentioned in the affidavit, they should have applied to have the value ascertained by appraisement, and that it was now too late to question the value. The learned county court judge, however, was of opinion that rules 30, 31, and 32 of Order XXXIX. B of the County Court Rules, 1892 (1), were directed to the question of arrest, and as they did not in positive words preclude evidence at the hearing, he held that, subject to granting an adjournment, if required, he "was bound to let the evidence in."

Evidence was accordingly admitted with the view of shewing that the value of the *Argo* was 400*l.*, and the defendants produced evidence in support of their affidavit of value.

(1) County Court Rules, 1892, Order XXXIX. B:—

"30. Where in an Admiralty action the amount sued for is paid into Court, together with costs, or the security completed, or the plaintiff requires it, the registrar shall deliver to the party applying for the same an order directed to the high bailiff of the Court, authorizing and directing him, upon payment of all costs, charges, and expenses attending the custody of the property, to release it forthwith."

"31. Notwithstanding the last preceding rule, the property in an Admiralty action for salvage shall not be released, except with the consent of the plaintiff, until its value has been agreed or an affidavit of value filed on behalf of the party seeking the release, unless the Court or the judge shall otherwise order."

"32. If the plaintiff is dissatisfied with the value mentioned in the affidavit filed under the preceding rule, he shall be entitled to have the value ascertained by appraisement, and for such purpose shall file a præcipe. The costs of such appraisement shall be in the discretion of the Court."

The learned county court judge, after hearing the evidence, fixed the value of the *Argo*, for the purposes of salvage, at 272*l.*, the fish salved at 48*l.*, making together 320*l.*, and he made an award of 80*l.* (to include the 75*l.* paid into court), being 40*l.* or one-eighth for salvage, and 40*l.* for loss of fishing, with costs.

On appeal,

Sir Walter Phillimore, and *A. E. Nelson*, for the appellants (defendants). The practice in the High Court is that, in the absence of agreement, if the plaintiffs dispute the correctness of the affidavit of value, they must apply for an appraisement, and if no application is made to the Court to have the appraisement set aside, it becomes binding on the parties: see Williams and Bruce's Admiralty Practice, 2nd ed. p. 310. The County Court Rules similarly provide, in an Admiralty action for salvage, for the release of the property from arrest, after agreement as to the value, or an affidavit of value, or if the plaintiff salvor is dissatisfied with the value of the salved property as given in the affidavit of the defendant, the plaintiff is entitled to insist upon appraisement, rule 32 being clear on this latter point, which was not the case under the earlier rules for which these are substituted. By s. 164 of the County Courts Act, 1888, the general principles of practice in the High Court are to be followed where the case is not expressly dealt with, and it is submitted that the object of this appraisement is to render the value so ascertained conclusive, and avoid the expense of calling experts, on both sides, at the trial.

[BRUCE, J. There seems to me to be another reason why, if the plaintiff is dissatisfied with the value, the plaintiff should have the property appraised, for then the defendant will know, before trial, what amount to tender.]

Yes; and, in the present case, the amount tendered by the defendants, and based on their own affidavit of value, was only 5*l.* less than the amount actually awarded. In cases where the difference is small, the practice of the High Court has been to regard the tender as adequate, though not liberal, and give the defendants their costs up to tender: *The Lotus* (1); but if the

(1) 7 P. D. 199.

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value put upon the *Argo* by the defendants had been accepted as correct, then it is clear, on the figures, that the learned county court judge would have held the tender ample, and, being a tender before action, he would have condemned the plaintiffs in costs: *The Emu.* (1) It is submitted that the learned judge was wrong in holding that he was bound to admit evidence adduced to shew that the value of the salved vessel was larger than that sworn to by the defendants before the hearing.

Butler Aspinall, for the respondents (plaintiffs). A county court judge, if in doubt as to the value of the property salved, is entitled to inform himself as to the facts by oral evidence at the trial, and there is no positive rule of practice in the High Court, or in the county court, prohibiting a judge from so doing. The Rules of the Supreme Court, Order XXIX., r. 5, enable the property to be released if the value be agreed, or an affidavit filed. This is only an incorporation of the repealed rule contained in the Admiralty Court Rules, 1859, for the purpose of obtaining the release of the property. So the group of County Court Rules to which reference has been made are headed "release of property," and are all directed to that end. The plaintiff by rule 32 is "entitled to have the value ascertained by appraisement"; but he is not compelled to do so, or prevented from giving evidence at the trial where he has not applied for an appraisement.

[BRUCE, J. I doubt whether any Court would have jurisdiction to take evidence before appraisement, though, when the appraisement has been made, and good grounds exist for questioning its accuracy, the Court might, in its discretion, direct further inquiry.]

It is clear from the correspondence between the two solicitors that the question of value would be gone into at the trial, and the learned county court judge may well have thought that he was, under the circumstances, bound to let the evidence in, subject to an adjournment which the judge was prepared to allow if the defendants alleged surprise.

[The case of the *Farnley Hall* (2) was referred to on the

(1) 1 Wm. Rob. 15. (2) 4 Asp. M. L. C. (N.S.) 499.

question of a Court of Appeal not interfering with the amount of an award except under very exceptional circumstances.]

THE PRESIDENT (SIR F. H. JEUNE), [after referring to the tender, and to the letters which passed between the solicitors of the parties as to value, proceeded:] The result of the evidence is that no formal notice was given; but, when the trial came on, evidence was tendered to shew that the salved smack was of greater value than the value in the affidavit.

The learned county court judge considered whether or not he ought to receive evidence as to value, and he held, undoubtedly, that he was bound to receive it. After hearing it, he came to a conclusion which put the value of the vessel considerably higher than 140*l*.

The rules which apply to this case are: [The learned judge read the three rules, already set out, and continued:—]

I do not think it necessary to compare those rules with the earlier rules. I agree that the main difference is the addition in rule 32, which made it clear that the plaintiff had the right of appraisement if he was dissatisfied with the value in the affidavit. Nor do I think it necessary to compare these rules with the rule of the High Court, because the latter rule is not a perfect expression of the law on the subject, since it is intended as a complement to the well-known practice of the High Court.

These rules stand as the code by which the county court is to be governed, and it is contended by counsel for the plaintiffs, following the view which presented itself favourably to the learned judge, that the words of rule 31 are solely connected with the subject of arrest. I am unable to agree with that view. They refer to arrest because they prescribe that, notwithstanding the provision as to release under rule 30, in the one case of salvage the release is not to take place until the value has been agreed upon, or an affidavit of value filed; but it appears to me that the power and effect of the rules are not exhausted, or intended to be exhausted, merely in reference to release. They provide further for a determination of the value of the res before the trial in the case of salvage, because they lay down that, notwithstanding that the full amount may be paid into court, and

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security for costs given, the release shall, in salvage cases, not be allowed, until the value has been determined by agreement, by affidavit, or by appraisement.

Now, why is that provision made? Clearly, it seems to me for the purpose first, of tender, and, secondly, of determining what the value of the res is to be taken to be at the trial. Having got so far, it appears to me that a plaintiff, who is dissatisfied with the affidavit, ought to demand an appraisement, and, in every ordinary case—I do not like to go so far as to say in every case—the judge ought to insist upon the value being determined either by affidavit if uncontested, or by appraisement if contested.

I do not say that the Court has no power to go beyond an appraisement, or, where there is no appraisement, that the Court has no power to try the value of the res. I am not saying that no such case is possible; because the circumstances may be such as to justify that course; but the rules appear clearly to me to point to a regular course to be pursued, and it is wise, I think, to insist that, as a regular practice, there shall be, in case of dispute, an appraisement. It is obvious that not only is that following as closely as possible what is the practice in the High Court, but it is extremely important that the value of the res shall be determined at the moment when it may best be determined, and in a way which is economical, rather than be left to the disputed evidence of experts at the trial. I think, therefore, that the rules point to the course which ought to be followed in almost every case. The learned judge's view, as expressed in the judgment he has delivered, clearly was that he was bound to take the evidence, and, as I have said before, his reason was that he thought rule 31 was solely connected with the release. I am obliged to say that the learned judge was mistaken in that course. He should, I think, have exercised his discretion whether, in the particular case, the plaintiffs should not be held bound by the affidavit.

The learned judge did not exercise that discretion, and therefore, I think, we are bound to consider the matter, and to exercise the discretion which he should have exercised. Exercising that discretion, in all the circumstances of the case, it

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seems to me clear that the evidence ought not to have been gone into. The learned judge ought to have said that the rules gave ample opportunity to the plaintiffs of challenging the affidavit if they chose; that they had not chosen to avail themselves of those rules; that, under the circumstances, no injustice would be done by holding them bound by the affidavit; and that, on the contrary, injustice would be done to the defendants by taking the evidence. Therefore, I think, he ought to have held the affidavit as conclusive evidence.

But there is another question. Assuming that the judge was right in going into that evidence, ought one to say that his conclusion was not right? I observe that the only evidence given by the plaintiffs was the evidence of a person interested, and the evidence on the other side was the evidence of several witnesses, one at least of whom was disinterested, and another was connected with the insurance. I am quite unable to come to the conclusion, on the whole of the evidence, that the learned judge was right in taking the higher value, and, I think, that the value given in the affidavit was, approximately, the real value.

There are thus two grounds—first, that the learned judge ought to have held the plaintiff bound by the affidavit, and, secondly, that on the evidence taken, the value was put too high by the learned judge.

The result is, that inasmuch as the learned judge, in taking the higher value, thought that 80*l.* was the proper amount to be awarded, if he had considered that the true value of the vessel was only 140*l.*, he would, undoubtedly, have considered that 75*l.* was sufficient. Therefore, I think, the tender was sufficient, and, under those circumstances, the decision of the learned judge must be varied by declaring accordingly.

BRUCE, J., concurred.

Appeal allowed and tender upheld with costs.

Solicitors for plaintiffs: *Laverack & Son, Hull.*

Solicitors for defendants: *Andrew M. Jackson & Co., Hull.*

C. A.
1894
Nov. 8.

[IN THE COURT OF APPEAL.]

NEPTUNE STEAM NAVIGATION COMPANY *v.* SCLATER.
THE DELANO.

Admiralty—Practice—Appeal from County Court to High Court—Security for Costs—Decree not exceeding 50*l.*—*Point of Law—Construction of Statute—Special Provisions, General Words—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, security for costs must be given in the county court before bringing an appeal; and by s. 31, "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*"

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, any party, in any action or matter, aggrieved by the decision of the judge in point of law, may appeal to the High Court:—

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), that, by the general words of s. 120 of the Act of 1888, ss. 26 and 31 of the Act of 1868 are impliedly repealed to the extent of allowing the party aggrieved by the determination of the judge in point of law to appeal, without security for costs being first given, and whether the amount involved is under or over 50*l.*; but, in respect of a question of fact, the special provisions of the Act of 1868 are left unaffected.

The Eden ([1892] P. 67) approved.

Appeal by plaintiffs, the Neptune Steam Navigation Company, Limited, owners of the steamship *Delano*, against a decision of the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes, J.) in favour of the defendants, Sclater and Procter, on the construction of a bill of lading, under which they were consignees of a part cargo of wheat.

The case is reported only on the question of the right of appeal from the county court to the Divisional Court.

On December 12, 1893, the plaintiffs issued a summons under the Admiralty jurisdiction of the county court of Durham, holden at Sunderland, for 49*l.* 9*s.* 4*d.* damages in the nature of demurrage, for one day's detention, by the defendants, of their vessel in the Tyne. On February 21 the learned county court judge gave judgment for the plaintiffs. The defendants, without giving security for costs, appealed to the Probate, Divorce, and

Admiralty Division of the High Court, on the ground, inter alia, that upon the true construction of the bill of lading they were entitled to judgment.

On May 3, 1894, the appeal came on for hearing before the Divisional Court sitting in Admiralty, when the plaintiffs took the preliminary objection that the appeal was barred by ss. 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868 (1), as security for costs had not been given in the county court, and the amount involved was under 50*l.*

The Divisional Court, following *The Eden* (2), overruled the preliminary objection, holding in effect that s. 120 of the County Courts Act, 1888 (3), gave a right of appeal on a point of law

(1) 31 & 32 Vict. c. 71 :—

Sect. 26 : "An appeal may be made to the High Court of Admiralty of England from a final decree or order of a county court in an Admiralty cause, and, by permission of the judge of the county court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct."

Sect. 31 : "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*"

(2) [1892] P. 67.

(3) 51 & 52 Vict. c. 43 :—

Sect. 120 : "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge, may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court : provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds, nor in any action of replevin, where the amount of rent or the damage or value of the goods seized does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter."

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without reference to the amount involved, and, on the construction of the bill of lading, reversed the decision of the county court judge.

The plaintiffs appealed to the Court of Appeal. On the case coming on for hearing, on July 13, 1894, the preliminary objection raised in the Court below was suggested by the Court of Appeal as a difficulty, and the case stood over for argument.

Nov. 8. *T. Willes Chitty*, and *Frank Newbolt*, for the appellants (plaintiffs), in support of the preliminary objection. The County Courts Admiralty Jurisdiction Act, 1868, conferred Admiralty jurisdiction on a certain number of county courts, selected by the Order in Council made in pursuance of the Act; and ss. 26 to 31 of the Act form a code of procedure in respect of Admiralty appeals from such county courts to the High Court. The defendants have no right of appeal under the provisions of that code, for by s. 26 it is a condition precedent that security for costs be first given in the county court: *The Forest Queen.* (1) By s. 31 there is a condition interposed that the amount involved must exceed 50*l.*: *The Falcon.* (2) The defendants' right of appeal is, therefore, absolutely barred.

The respondents rely upon the provisions of s. 120 of the County Courts Act, 1888; but that Act consolidates and amends the County Courts Acts, and, for that purpose, the Acts specified in the schedule, being the Acts from 1846 downwards, by which a limited jurisdiction, at common law and in equity, was conferred on county courts generally, are expressly repealed; but the Act does not affect to deal with the special procedure and jurisdiction conferred on certain county courts by the County Courts Admiralty Jurisdiction Act, 1868, and has designedly left that Act unrepealed, only one section (s. 29) being repealed by the Act of 1875.

It is a rule of construction that Acts of a general nature do not repeal particular enactments: *Conservators of the River Thames* v. *Hall* (3); and if it had been intended that a permissive

(1) Law Rep. 3 A. & E. 299. (2) 3 P. D. 100.
(3) Law Rep. 3 C. P. 415.

section like s. 120 should apply to the Admiralty side of a county court, and override the positive enactments of ss. 26 and 31 of the Act of 1868, it would have been so stated, and, in the schedule containing a list of the Acts, and portions of Acts, repealed, there would have been a reference to those sections; but there is no indication that the jurisdiction in Admiralty is intended to be modified or extended.

Sect. 120 of the Act of 1888 is, in fact, a re-enactment of s. 6 of the County Courts Act, 1875, by which appellants were enabled to proceed by way of motion, instead of by special case, as previously required at common law.

[RIGBY, L.J. The right of a party dissatisfied with the determination of the county court judge in point of law, without limitation of amount, was given by s. 14 of the County Courts Act, 1850 (13 & 14 Vict. c. 61.)]

Yes; the Act of 1875 only simplifies the procedure by extending to common law the mode of appealing in equity, whilst both common law and equity are included in the Act of 1888, the appeal by way of special case being prevented by the terms of s. 124 of the latter Act.

It is true that there is a reference to Admiralty actions in s. 125 of the Act of 1888; but these provisions for the purpose of enabling Elder Brethren of the Trinity House to be summoned as nautical assessors on the hearing of an appeal from a county court, only embody the terms of s. 11 of the County Courts Act, 1875, and are inserted to enable the whole of the latter Act to be included in the schedule to the Act of 1888, as repealed, and not for the purpose of including Admiralty matters in that Act.

In *The Eden* (1) a Divisional Court sitting in Admiralty held that s. 120 of the County Courts Act, 1888, did apply to Admiralty appeals; but the learned judges who decided that case in effect only followed a previous decision of the same Court in which s. 74 of the County Courts Act, 1888, was held to apply to Admiralty: *The Hero.* (2) There is, however, no inconsistency in holding that s. 74 applies, because the question

(1) [1892] P. 67. (2) [1891] P. 294.

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of the residence of the defendant within the district of the county court is not a matter dealt with by s. 21 of the Act of 1868.

In *The Cashmere* (1) Butt, J., delivering the judgment of the Divisional Court, inclined to the view that the County Courts Act of 1888 did not repeal or alter the provisions of the County Courts Admiralty Jurisdiction Act, 1868; and, in *The Humber* (2), Sir James Hannen held that the procedure prescribed by ss. 26 and 27 of the County Courts Admiralty Jurisdiction Act, 1868, was not repealed by any subsequent Act, although s. 6 of the County Courts Act, 1875, was then in force.

[The cases of *The Dart* (3) and *The Alne Holme* (4) were also referred to.]

H. F. Boyd, and *Simey*, for the respondents (defendants). It is not contended that any section of the Act of 1868 is repealed by the Act of 1888, or, if the words "no appeal" in s. 31 of the Act of 1868 cannot be read as "no appeal under this Act," then it is submitted that that section is only impliedly repealed by s. 120 of the Act of 1888 to this extent, that, while ss. 26 and 31 of the Act of 1868 give an appeal from a county court to the Admiralty Court, whether on fact or law, provided the amount ordered to be due exceeds 50*l.*, the Act of 1888 gives an additional right—that is, a right to appeal by way of motion on a point of law, without reference to the amount involved. Sect. 120 of the Act of 1888 is substantially a re-enactment of s. 6 of the Act of 1875; and since 1875 there have practically been two modes of procedure, one under the Act of 1868, by way of lodging the instrument of appeal, and giving security for costs, with the object of reviewing the whole case whether involving law or fact or both, the amount decreed or ordered to be due being over 50*l.*; and, under the Act of 1875, the cheaper procedure by motion with the object of reversing a decision on a point of law raised and submitted in the Court below.

The action now before the Court was brought under sub-s. 1

(1) 15 P. D. 121.
(2) 9 P. D. 12.
(3) [1893] P. 33.
(4) [1893] P. 173.

of s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), by which jurisdiction, arising out of any agreement made in relation to the use or hire of a ship or of the carriage of goods in any ship, was conferred on any county court appointed to have Admiralty jurisdiction. The Act is to be read as one Act with the County Courts Admiralty Jurisdiction Act, 1868, which by s. 34 incorporates the County Courts Act, 1846, and the Acts amending or extending it, then in force; and the effect of holding that there is no appeal in an Admiralty cause under 50*l.* would be that the defendants in this case would be able to appeal if the action had been brought on the common law side of the county court; but the plaintiffs would be able to prevent an appeal by bringing the action, as they have done, on the Admiralty side.

Such an anomalous condition of things could never have been contemplated by the legislature when giving county courts jurisdiction in such claims as these, which are not the subject of original jurisdiction in the Court of Admiralty: *The Alina.* (1)

It is clear from ss. 10 and 11 of the County Courts Act, 1875, that Admiralty matters were in contemplation of the legislature in that Act, and the re-enactment of s. 11 by s. 125 of the Act of 1888 shews that Admiralty matters were also present to the minds of the framers of the latter Act. The cases of *The Humber* (2) and *The Cashmere* (3), cited by the plaintiffs, are, so far as they go, in favour of the contention of the respondents.

[The case of *Rockett* v. *Clippingdale* (4), and the Rules of the Supreme Court, 1883, Order LIX., rr. 1 (*c*), 4, 9, were also referred to.]

LORD ESHER, M.R. It seems to me that the words at the beginning of s. 120 of the Act of 1888 are large enough to include all county court actions, and a cause on the Admiralty side of the county court is, in my opinion, a county court action. If, therefore, you read the words of s. 120 to the full extent of their

(1) 5 Ex. D. 227.
(2) 9 P. D. 12.
(3) 15 P. D. 121.
(4) [1891] 2 Q. B. 293.

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ordinary meaning, the section says that "if any party in any action"—which I think must be in any action or suit in the county court—"shall be dissatisfied with the determination or direction of the judge in point of law . . . . the party aggrieved by the judgment . . . . may appeal," and appeal without any restrictions. I think it is a rule of construction that you are bound to give to the words in an Act of Parliament which are in large terms the full meaning and largeness of those terms, unless prevented by something else.

The Act of 1868 deals with Admiralty actions also, and has large words. Sect. 26 of that Act says: "An appeal may be made to the High Court of Admiralty from a final decree or order of a county court in an Admiralty cause . . . . on security for costs being given." Sect. 31 says: "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l*." The 26th section, if read by itself, would give an appeal from any decree or order; but as in the very same Act of Parliament you have another section which says no appeal shall be allowed unless the amount exceeds 50*l*., you have to turn back from that section to s. 26, to limit the largeness of the words in s. 26, and say that there shall only be an appeal from a final decree where the amount decreed exceeds the sum of 50*l*. Upon that statute, therefore, there is no appeal if the amount is under 50*l*. But if the words of s. 120 of the subsequent Act can fairly be made to apply to the Act of 1868, you have s. 120, not dealing with the whole of the appeal, which is dealt with in the Act of 1868, but dealing only with part of it, viz., where there is an appeal upon a matter of law. It does not deal with the part which says there is to be an appeal on a question of fact.

If the Act of 1888 were inconsistent with the whole of the Act of 1868, it would by implication repeal the whole of it. If it is inconsistent with only part of it, but is consistent with part of it, what is the rule? It impliedly repeals so much of the former Act as it is inconsistent with, but not the rest of it. If, therefore, it is inconsistent with that part of the 1868 Act which deals with the question of law, and only inconsistent with that, it repeals that part, but leaves standing the appeal on the question

of fact. If, therefore, the 120th section repeals so much of the Act of 1868 as deals with an appeal on a question of law, it repeals part of ss. 26 and 31; the result being that where an appeal in an Admiralty cause from the county court is upon a question of law, there is an appeal without any condition or stipulation; but where it is an appeal on a question of fact, then that question of fact remains under the Act of 1868, and there may be an appeal if the amount is above 50*l.*, subject to security for costs being given. If the question is one of fact, and the amount is under 50*l.*, there is no appeal at all.

The whole question, therefore, seems to be whether it can be said that the general words of s. 120 of the Act of 1888 are applicable at all to an Admiralty action or suit in the county court. There are strong reasons for saying that the section does not apply to Admiralty actions; but the words, in my opinion, are large enough to include them, and I do not think that there is any law preventing us from saying that the words of s. 120 do apply to an appeal from the Admiralty side of a county court. I conclude, therefore, on the whole, that it does apply, and that the law now stands thus: On an Admiralty cause or suit being tried in the county court, if the amount is under 50*l.*, but the question to be appealed against is a question of law, the party aggrieved may appeal. Of course he may appeal if the amount is above 50*l.* On a question of law, therefore, he may appeal if the amount is under or over 50*l.*, under the statute of 1888; on a question of fact, however, he is confined to the appeal given by the statute of 1868, under which there is no appeal on a question of fact under 50*l.*, but there is an appeal on a question of fact above 50*l.*, upon security for costs being first given.

LOPES, L.J. The conclusion at which the Master of the Rolls has arrived is a very salutary one, and I think it is a result at which, in all probability, the legislature would have arrived if the matter had been brought to their notice—I mean if the Act of 1868 had been sufficiently brought to their notice at the time the Act of 1888 was passed.

I do not propose to differ from the rest of the Court, but I

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cannot help saying that I should have great difficulty in arriving at the result unaided by the view taken by the Master of the Rolls, and what I understand to be the opinion of my brother Rigby. I also bear in mind that we are approving the decision in *The Eden* (1), and I therefore do not dissent from the judgment which has been given, but I desire to say that I arrive at it with great hesitation.

RIGBY, L.J. If s. 120 of the Act of 1888 be considered apart from all other statutory provisions, it most plainly gives an appeal in every action or matter which would come before a county court judge. Why should we not give effect to the general words of that section? Considerations have been suggested, which are not without weight, why we should cut down those words; but, considering that this is intended to be a code—I will not say a complete code—for procedure in the county courts, I see no sufficiently valid reason why we should not give the larger interpretation, which is the natural interpretation, and which is the interpretation that is most nearly consistent with the whole scheme. I do not say absolutely consistent, for I cannot disguise from my mind that, in all probability, the attention of the legislature was not, when this s. 120 was being dealt with, distinctly called to the matters to which it was to apply. I think, however, that it is our duty, as far as we can, without straining words beyond their customary and usual meaning, to consider whether there is anything in the scheme of this Act that would have prevented the legislature, if they had been so minded, from applying this particular provision to Admiralty actions. I can find no satisfactory reason for saying so, though I do not think that the proceedings in Admiralty actions were distinctly present to the minds of the legislature, because otherwise they might have inserted in s. 120 a limit, as they have done in the case of actions of replevin and in the other cases mentioned, and probably would have done in the case of Admiralty actions. I take it, altogether, that the safer way is to abide by the natural construction of the words, and give them their usual effect, unless satisfied—which I am not—that they

(1) [1892] P. 67.

were intended by implication to be cut down. I therefore agree with the decision of the rest of the Court.

Preliminary objection overruled.

The appeal of the plaintiffs was then heard on the merits, and the decision of the Divisional Court affirmed.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Downing, Holman & Co, for Pinkney & Bolan, Sunderland.*

Solicitors for respondents (defendants): *Rowcliffes, Rawle & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

T. L. M.

[IN THE COURT OF APPEAL.]

THE ORIENTA.

Admiralty—Maritime Lien—Liabilities incurred by Master—Bill of Exchange—Priorities—Mortgagees—Merchant Shipping Act, 1889 (52 & 53 *Vict. c.* 46), *s.* 1.

The defendants, shipowners in London, contracted with a coal merchant for the supply of bunker coal to their vessel then lying in the port of London, and about to sail on a voyage to the Mediterranean. As part of the contract payment was to be made by bill of exchange drawn by the master on the defendants in favour of the coal merchants. The bill so drawn by the master was accepted by the defendants but dishonoured at maturity; and the plaintiff, the master of the vessel, thereupon issued a writ in rem, arrested the ship, and claimed the amount of the bill, notarial charges, and the costs of an action against him as drawer. The defendants did not appear; but on the intervention of prior mortgagees of the vessel:—

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), affirming the decision of the President ([1894] P. 271), that the liability of the plaintiff as drawer of the bill of exchange was not a liability "properly incurred by him (as master) on account of the ship" within the meaning of s. 1 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), and, therefore, no lien had been created in his favour to the prejudice of the mortgagees.

The terms "disbursements" and "necessaries" considered.

APPEAL by plaintiff, Edmund Elliott, master of the steamship *Orienta*, against the decision of the President in favour of the mortgagees intervening in an action in rem for alleged liabilities.

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The case is fully reported in the Court below. (1) The following is a summary of the facts:—

In January, 1894, the defendants, the Orienta Steam Yachting Association, Limited, required bunker coal for the use of their steamship the *Orienta*, which they were about to despatch from London on a sixty days' yachting cruise to the Mediterranean. They accordingly ordered 1215 tons at 22*s.* per ton of Phillips & Walton of Newcastle, who agreed to supply the defendants with this quantity on the terms of "payment by captain's draft in our favour upon you, and accepted by you, payable as to one-half of the amount of invoice three days after sailing, and the other half at sixty days from date of shipment; these documents to be handed us when our steamer with the coals is put alongside." The coals were duly delivered, and, in pursuance of the contract, the master, on February 6, attended at the registered office of the defendants in London, and drew two bills of exchange on the defendants for 668*l.* and 668*l.* respectively in favour of Phillips & Walton. On February 14 the vessel sailed. On February 21 the first bill fell due, and was met by the defendants. On April 16 the vessel returned to London. On April 28 the second bill fell due, but was dishonoured by the defendants. On May 24 the master of the vessel, relying upon s. 1 of the Merchant Shipping Act, 1889 (2), issued the writ in the present action and arrested the *Orienta*. Her owners, the defendants, did not appear; but the first and second mortgagees (the Yorkshire Trust, Limited, and the Securities Insurance Company, Limited), who had made advances and held registered mortgages on the ship dated respectively May 5 and July 18, 1893, intervened, gave bail for 850*l.*, and obtained the release of the vessel.

The case set up by the plaintiff was, that he was a master mariner, and, whilst serving as master of the *Orienta*, incurred liabilities on behalf of the defendants, the owners of the vessel,

(1) [1894] P. 271.

(2) Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), s. 1: "Every master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages. . . ."

for "bunker coals supplied to and necessary for the use of the said ship," for which he drew the bill of exchange dishonoured by the defendants; that an action had been commenced by the holders of the bill against him as drawer, and that he had become liable to pay the amount of the bill, and he claimed 668*l.* with interest at 5 per cent., and 17*s.* 6*d.* notarial charges, together with the costs of the action against him.

The defence set up by the mortgagees, as interveners, in effect was that the coals were supplied on the sole credit of the defendants, the owners of the ship, at the home port of the vessel, and not in the course of any voyage; that the plaintiff's part in the transaction was merely colourable, as the alleged liabilities were not incurred, and the bill of exchange was not drawn by the plaintiff "acting bonâ fide as master, and on account of the ship, and in the ordinary course of his duty as such master"; but the liabilities were incurred, and the bill of exchange drawn, for the purpose of attempting to give the suppliers of the coals a lien on the vessel to the prejudice of the interveners, the mortgagees.

On July 30 the President (Sir F. H. Jeune) gave judgment for the interveners with costs, leaving the plaintiff to move for such judgment as he might be advised against the defendants, the owners of the *Orienta*, and—after reviewing the cases bearing on the question of the lien of a master in respect of liabilities incurred on account of the ship—the learned judge observed that the whole of the proceedings in the action were an ingenious device to create a liability in the master within the meaning of s. 1 of the Act of 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages, but that it failed, for the Act of 1889 was only intended to restore the law as it stood before the decision of the House of Lords in *The Sara* (1), that is, to create a lien where the liabilities were such as would, by virtue of the master's general authority and without express authority, have pledged the owners' credit; but in this case "there was no purchase by the master at all. The owner made a contract himself with the vendor of the coals, and, as a term of it, agreed to his master's liability being pledged by his giving bills." The master was not "in thus, at the request of his

(1) 14 App. Cas. 209.

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owners, lending his name, acting within the ordinary course of his employment as master."

On appeal,

Pickford, Q.C., and *Dawson Miller*, (*Aspinall, Q.C.*, with them), for the appellant (plaintiff). The substantial question is whether a master, who, with the express assent of his owners, has incurred liabilities for necessaries for the ship in a home port, is entitled to a maritime lien under s. 1 of the Act of 1889, and, if so, as the owners in this case are insolvent, and the vessel has been sold for less than the mortgages upon her, the further question arises: whether the coal merchants, who supplied the necessaries against the master's draft on his owners in their favour, are entitled to avail themselves of the lien of the master and so gain priority over the mortgagees.

It is submitted that, as the law now stands, both these questions should be answered in the affirmative, for under s. 191 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the master obtained the right of recovering his disbursements in the Court of Admiralty, in priority to a mortgagee even in possession, if any right of set-off or counter-claim was set up to his claim for wages, so as to allow of the accounts between the master and his owners being gone into: *The Caledonia* (1); and an examination of the master's claim, in the schedule annexed to the registrar's report at p. 420 of *The Glentanner* (2), shews that no distinction was drawn between disbursements in a home or foreign port, but the whole account was gone into, and the mortgagee intervening was compelled to submit to a settlement of all the accounts between the master and the ship. The difficulty at that time existing in the master's way, that he could not initiate a suit for disbursements in the Court of Admiralty, was removed by s. 10 of the Admiralty Court Act, 1861 (24 Vict. c. 10), and, in *The Chieftain* (3), decided under that Act, it was held that the mortgagee of a ship coming in and defending his interest in the ship sued can only rely on

(1) Sw. 17. (2) Sw. 415.

(3) Br. & L. 104.

defences open to the owner of the ship, and, in that case, the claim by the master not only included disbursements before the vessel left London, but the master never sailed in the vessel at all. In *The Mary Ann* (1) it was expressly decided that the Act of 1861 gave the master a maritime lien for disbursements, and an examination of the items in that case shews that the disbursements were chiefly in a home port, and the master's claim was preferred to that of the mortgagee intervening.

[LORD ESHER, M.R. The point was not taken in that case that some of the disbursements were in a home port.]

It is submitted that that would have made no difference, because the question is, whether the disbursements are necessary for the use of the ship, and in respect of which the owner would be liable. In *The Feronia* (2) it was held that liabilities incurred by the master for articles expended for the benefit of the ship are to be considered as disbursements, and items 21 and 22 of the master's claim in that case were clearly disbursements in a home port.

The Glentanner (3), *The Mary Ann* (1), and *The Feronia* (2) were overruled by *The Sara* (4), but the Act of 1889 was immediately passed to restore the law as it stood before this decision of the House of Lords, the result being that the master of a ship again enjoys the protection he formerly had.

It is admitted by the respondents that the coals for which the draft was given were necessaries supplied for the use of the ship to enable her to prosecute her voyage. The liability was therefore, in the words of the Act of 1889, properly incurred by the master on account of the ship.

[LOPES, L.J. Does not the power of the master to pledge the credit of his owners depend on the necessity of the case, in the absence of the owner? Abbott, C.J., in *Webster* v. *Seekamp* (5), said that "there is no better rule to ascertain (what is necessary), than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act."]

(1) Law Rep. 1 A. & E. 8.
(2) Law Rep. 2 A. & E. 65.
(3) Sw. 415.
(4) 14 App. Cas. 209.
(5) 4 B. & Ald. 352.

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No doubt the liability incurred by the master must be in respect of what is necessary for the ship, and which the owner would order; but all that that case did was to supply a definition of what is a necessary; and it was there held that a claim for coppering the ship in Liverpool, on the order of her master, when she was about to sail on a voyage to Newfoundland and the Mediterranean, was good against her owners, who resided at Ipswich. So, in *Arthur* v. *Barton* (1), a claim, for money advanced to the master in Swansea, was held good against the owner residing near Portmadoc, on the ground that the advance was necessary for the prosecution of the voyage. In the present case there was express authority by the owners of the *Orienta* to incur the liability for a necessary for the ship; so that as there was both a liability incurred, equivalent to a disbursement, on account of the ship, and the owners were liable, the case is brought within the meaning of the decision in *The Castlegate* (2), and no injustice is inflicted on the mortgagee, for it is the ordinary course of business for a master, in a foreign port, to draw on his owners in favour of those who supply the necessaries, and the master's claim for the liability incurred, in respect of the bill so drawn, is always supported against mortgagees, although, owing to the rapidity of communication now existing, the owner may have telegraphed to his agent to order the necessaries against which the bill is drawn.

Sir Walter Phillimore, and *F. Laing*, for the respondents (the mortgagees intervening), were not called upon.

LORD ESHER, M.R. This is a clear case. For a century or more it has been common knowledge that the master is only authorized to pledge his owners' credit for what may be called "things necessary" for the ship; that is to say, he can pledge his owners' credit if he is in a position where it is necessary, for the purposes of his duty, that these things should be supplied, and he cannot have recourse to his owners before ordering them, just as he can give a bottomry bond on the ship where the necessity arises in the sense which I have just stated.

But then there came these Acts of Parliament, which say he

(1) 6 M. & W. 138. (2) [1893] A. C. 38.

should have a lien for disbursements. Now, if he should have a lien upon the ship, then the ship is bound to him; but the master cannot bind the ship to himself by ordering goods which he was not authorized to order at all, so as to pledge his owner's credit for them.

The real meaning of the word "disbursements" in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he, as master of the ship, is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master.

Here no disbursements were made by the master; no goods were ordered by the master at all; no liability was incurred by the master in respect of these goods. He is not liable for the price of the coals, though it may be that the bill is drawn for the exact price. What he has done is, at the request of his owners, to make himself drawer of the bill of exchange which the owners were to accept; but it does not make the master liable to anybody unless the owners dishonour the bill when it becomes due and the proper notices have been given. That is not a liability in respect of the coals—that is a liability in respect of the bill of exchange. It is not a liability incurred by him in his office as master, but by his being the drawer of the bill at the request of his owners irrespective of his being master.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellant (plaintiff): *Botterell & Roche.*

Solicitors for respondents (the mortgagees intervening): *Ince, Colt, & Ince.*

T. L. M.

C. A.
1894
Dec. 13.

[IN THE COURT OF APPEAL.]

THE KATY.

Admiralty—Charterparty—Demurrage—Running Days—Lay-days.

By a charterparty, fourteen running days (Sundays and holidays excepted) were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay-days at fourpence per ton on the steamer's gross register tonnage per running day. Seven of the lay-days were consumed at the port of loading, and the vessel arrived at the port of discharge on a Saturday, but was not cleared till 10 A.M., when the master gave notice to the defendants, the consignees of the cargo, that the vessel was ready to discharge. The defendants declined to receive the cargo on that day, but ultimately agreed, and the discharge took place on the Saturday for three hours, viz., from 1 P.M. to 4 P.M., and the unloading was finally completed by 9 A.M. on the Monday week :—

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reversing the decision of the President, that though the defendants were entitled to a whole lay-day, and were therefore not bound to take delivery on the Saturday, they, by agreeing to commence the discharge on that day, impliedly agreed to count that day as a lay-day. Therefore, the seven lay-days (excluding Sunday) expired on the following Saturday, and the defendants were liable to the plaintiff, the shipowner, for two days' demurrage :

Held also, affirming the decision of the President, that running days meant calendar days from midnight to midnight, and not periods of twenty-four hours.

APPEAL by plaintiff, Frederick Gordon, on behalf of himself and others, the owners of the steamship *Katy*, in an action to recover two days' demurrage, against a decision of the President (Sir F. H. Jeune) in favour of the defendants, Walmsley & Smith, consignees of cargo, and holders of the bill of lading.

By charterparty in the 1890 form of Danube charter, dated February 1, 1894, the *Katy* was chartered by the plaintiff to F. Mendl & Co. to load a cargo of grain at Sulina for the United Kingdom or Continent, between Havre and Hamburg; and by clause 2, orders for the stipulated port were to be given at Gibraltar within twelve running hours of arrival or lay-days—Sundays only excepted—to count. By clause 3, the charterers were to have the right, subject to the payment of certain extra freight, to order the steamer from Gibraltar to Queenstown, Falmouth, or Plymouth (at master's option) for final orders, to

be given within twelve running hours (twenty-four hours at Queenstown) of arrival, or lay-days—Sundays only excepted—to count. By clause 7: "*Fourteen running days*, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted, *are to be allowed the said freighters* (if the steamer be not sooner despatched) *for loading and unloading*, and ten days on demurrage over and above the said lay-days, at fourpence per ton on the steamer's gross register tonnage per running day. . . . The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of March 10 next (new style), unless the steamer has been detained waiting for orders as to loading port longer than six hours, in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not." By clause 9 (*c*), at the port of loading the steamer was to load as much cargo inside the bar or harbour as she could safely proceed to the roads with, the remainder to be shipped in the roads at freighters' risk and expense; but in the latter case all days on which lighters were unable, from bad weather, to go outside, were not to count as lay-days, the master to have the option of proceeding from a port of discharge inaccessible by ice to the nearest safe open port or roadstead (telegraphing his arrival there to freighters), where he was to receive fresh orders for an open and accessible port of discharge in the United Kingdom or Continent, within twenty-four hours of arrival, or lay-days to count. By clause 12, should the steamer be ordered to discharge at a place to which there is not sufficient water for her to get the first tide after her arrival without lightening, and lie always afloat, lay-days were to count from forty-eight hours after her arrival at a safe anchorage.

Seven lay-days were occupied in loading, and the bill of lading—which was in the Mediterranean, Black Sea, and Baltic grain cargo steamer 1890 form, and by which freight was to be

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paid and all other conditions were to be performed as per charterparty—was accordingly so indorsed. The vessel was ordered to Barrow. She arrived there on Saturday, March 31, was moored in berth, and, except that she had not cleared at the Custom House, was ready to discharge at 8.30 A.M. The master made his entries at the Custom House at its opening at 10 A.M. Until this was done the discharge could not commence. At about 10.30 A.M. on that day the defendants received notice in writing from the master "that the SS. *Katy* from Sulina is now in berth and ready to discharge"; and the master, when handing this notice to the defendant, requested that the discharge should be commenced at once. This the defendants declined to do, but ultimately agreed, and the discharge commenced at 1 P.M. on that day, and finished at 9 A.M. on Monday, April 9.

The usual working hours at Barrow are from 6.30 A.M. to 5 P.M., except on Saturdays, when work ceases at 4 P.M.

There being no express provision as to when the lay-days were to commence, the plaintiff contended that the lay-days commenced on Saturday, March 31, and expired at midnight on Saturday, April 7, and claimed 71*l.* 18*s.* 8*d.*, being two days' (Sunday and Monday, April 8 and 9) demurrage at 4*d.* per ton per day on 2158 tons. The defendants contended that no demurrage was due, on the ground that the lay-days did not begin till Monday, or that, if counted from the time of commencing the discharge on the first Saturday, by periods of twenty-four hours, excluding Sundays, the lay-days did not expire until Monday, April 9. (1)

The case was tried on an agreed statement of facts, to which was annexed the charterparty and the bill of lading.

The President (Sir F. H. Jeune), in giving judgment for the defendants, observed that there were two questions. First,

(1) The following paragraph in the agreed statement of facts was not deemed material to the issues involved:—

"The average daily quantity discharged by the *Katy* was 445 tons. When work was stopped on the evening of Friday, April 6, there remained in the ship only some forty tons of cargo. The work was resumed on the following morning, but stopped at 10 A.M. by the defendants, who declined to proceed with the work unless the plaintiff would pay them the sum of 10*l.* if the discharge was completed that day."

whether the phrase "running days" in clause 7 meant calendar days, or whether it meant periods of twenty-four hours beginning from the commencement of discharging: as to this, the only doubt created was from inferences to be drawn from other parts of the charterparty; but the language of clauses 7 and 12 was different, so that no assistance could be derived from the latter, and clause 9 (*c*) was consistent with either view, whilst clauses 2 and 3 used the words "running hours," and, after referring to *Neilsen* v. *Wait* (1); *Commercial Steamship Co.* v. *Boulton* (2); *Hough* v. *Athya* (3); *Allan* v. *Johnstone* (4), the learned judge held "running" days meant "calendar" days.

As to the second question, viz., assuming that running days meant calendar days, was Saturday, March 31, to be reckoned as a lay-day, the learned judge referred to the case of the ship *Boston* in the *Commercial Steamship Co.* v. *Boulton* (5), and observed that, as a rule, part of a lay-day cannot be reckoned as a whole day, though the parties may expressly, or by their conduct impliedly, agree that it shall be so treated. In this case the three hours of Saturday occupied in discharging were so occupied by the wish and for the advantage of the shipowner, and "the parties did not assent to treating the Saturday as a lay-day," so that the lay-days did not expire until Monday, April 9.

On appeal,

Scrutton, and *H. Parker Lowe*, for the appellant (plaintiff). The Court below decided in favour of the plaintiff's contention that the day in clause 7 of the charterparty meant a calendar day, but also decided that the lay-days commenced at midnight on Sunday against the plaintiff's claim, as shipowner, to be entitled to count part of Saturday, March 31, as a whole lay-day, so that the lay-days would expire on Saturday, April 7, and give him two days' demurrage.

The proposition contended for by the plaintiff is summed up

(1) 16 Q. B. D. 67.
(2) Law Rep. 10 Q. B. 346.
(3) 6 Scotch Sess. Cas. 4th Series, 961.
(4) 19 Scotch Sess. Cas. 4th Series, 364.
(5) As reported in 3 Asp. M. L. C. (N.S.) 111.

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in Carver on the Carriage of Goods by Sea (1) thus: "In calculating the number of demurrage days to be paid for, a part of a day is counted as a whole one," and in support of this view the observations of Lush, J., are relied upon at p. 349 of *Commercial Steamship Co.* v. *Boulton* (2) . . . and it seems that for this purpose days are to be counted according to the calendar, and not as periods of twenty-four hours. So that presumably if the ship began to discharge in the middle of the day, that would be counted as one of the lay-days, or demurrage days, as the case might be."

The case of *Commercial Steamship Co.* v. *Boulton* (3) dealt with the charterparties of two separate ships, the *Brighton* and the *Boston*, and in respect of the *Boston* the charterparty stipulated that "eight running days are to be allowed the said merchants, if the ship is not sooner discharged, for loading and discharging the said ship and ten days on demurrage over and above the said lying days" at so much per day. The *Boston* arrived at her port of loading on a Sunday, but was not cleared until about noon on the Monday, and was not ready to load till about 4 P.M. The cargo, which was timber, was floated down the river in rafts, and some of it came alongside on that day and was taken on board, part on that day after 4 P.M., and the rest the next morning before any more came down. The loading was finished on the Tuesday week. The jury found that the first Monday was a working day, and the Court refused to disturb the finding, Mellor, J., saying: "The vessel is ready to receive cargo; a portion of the cargo arrives, and in the presence of persons interested in the matter the loading is commenced; the loading of that portion is finished before any other timber arrives. The question then is, Was there any reasonable ground for the jury finding that the day on which the first part of the timber arrived was, by the assent of the parties, treated as a loading day? . . . . I think there was evidence to entitle them to find as they have found"; and Quain, J., said: "As to the *Boston*, a more difficult question arises whether a working day can be counted where only part of a day has been used. I agree

(1) 2nd ed. § 631, pp. 650, 651.
(2) Law Rep. 10 Q. B. 346.
(3) As reported in 3 Asp. M. L. C. (N.S.) 111.

that the charterers are entitled to a fair working day, but if, for the convenience of all parties, a portion of a day is used, it may be counted. It was a question for the jury, and if there was any evidence the jury were entitled to find as they did. The evidence is that notice was given at 11 A.M., and a portion of the timber was then sent down and was loaded on the same day, the charterers or their agents being present and consenting. I think on this evidence the jury were justified in finding that this was to be counted as a working day."

In *Nielsen* v. *Wait* (1) the charterers were allowed eight running days, Sundays excepted, for loading and discharging, and ten days on demurrage. It is clear from that case that the phrase "running days" means all days as opposed to "working days," and, in fact, means "days," so that in the present case the first Saturday would reckon as one of the lay-days allowed the defendants, and the Sunday and Monday after the second Saturday would be days on which demurrage was payable.

Carver, for the respondents (defendants). By the charterparty the defendants were entitled to seven whole lay-days, and they were not bound to receive the cargo on March 31, for the master did not give notice till 10.30 A.M., and the vessel was not at that time cleared at the Custom House. In consequence, however, of the pressure put upon them by the master, in the interest of the shipowner, the defendants did consent to the discharge beginning at 1 P.M.; but as it was a Saturday the work ceased at 4 P.M., and the defendants cannot be taken to have agreed to have a whole lay-day counted against them because they agreed, for the benefit of the ship, to send down men to assist in unloading for three hours on a Saturday afternoon. It was only an act of courtesy on the part of the defendants, and there is no evidence that making this concession to the master of the ship was equivalent to giving up a day. It is a question of fact, and that fact has been found against the plaintiff. The decision in the *Boston* (2) was also based on fact, and turned on the finding of the jury in the circumstances of the case, for Mellor, J., said: "I will not say that if they (the jury) had found

(1) 16 Q. B. D. 67.

(2) *Commercial Steamship Co.* v. *Boulton*, 3 Asp. M. L. C. (N.S.) 111.

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otherwise I should have thought their finding ought to be disturbed"; and Quain, J., said, "I agree that the charterers are entitled to a fair working day." As to the question of how the days are to be reckoned, it is clear from the context that the days are periods of twenty-four hours, for in clause 12 "lay-days are to count from forty-eight hours after her arrival at a safe anchorage." This excludes any reference to calendar days. So in clauses 2 and 3 the words are "within twelve running hours of arrival," and "within twelve running hours (twenty-four hours at Queenstown) of arrival," both which expressions are also inconsistent with calendar days. Clause 7, which is now in question, is a cancelling clause, and the words, "if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours," refer to detention longer than six hours, after which the days for demurrage begin to run, so that computation by calendar days is again excluded.

H. Parker Lowe, in reply. In *Hough* v. *Athya* (1) there were nine lay-days left for calling and discharging: four and a half days were spent at the port of call, and five and a half at the port of discharge. The Court treated these as eleven days in all, and allowed two days' demurrage, though, if the defendants' contention is correct, the Court ought not to have allowed any demurrage at all, and the fact that, in this charterparty, hours are mentioned in clause 12, and elsewhere, does not affect clause 7, which is the one in dispute, as they cannot be read into it or alter its meaning.

LORD ESHER, M.R. The charterparty does not fix specifically any time when the unloading is to begin. It is not as if the defendants were to take delivery immediately on the ship being anchored, or immediately on the ship being in an unloading berth, or anything of that sort. There is no express moment stated in which the unloading is to begin; therefore, it will begin a reasonable time after the ship has arrived. Now, with reference to what is reasonable, there comes in the observation of Quain, J., in *Commercial Steamship Co.* v. *Boulton* (2), that "the

(1) 6 Scotch Sess. Cas. 4th Series, 961. (2) 3 Asp. M. L. C. (N.S.) 111.

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charterers are entitled to a fair working day." I agree with him, and think that, in this case, as the consignees had seven lay-days at the port of discharge, that means seven whole lay-days; so that, if nothing else had happened here, the charterers were not bound to take delivery when the captain asked them, because they would not have the whole of the Saturday, which they were entitled to have, and they might have said, "No, we will not count a part of the day; it is not reasonable that we should. The lay-days will begin on Monday."

When, however, the days do begin, I have no doubt that the days mean days, and that the fact that, in another part of the charterparty forty-eight hours are mentioned, cannot alter the plain stipulation that the freighters are to have seven days, that is, seven whole days—days in their ordinary sense, that is to say, in this case, if nothing else had happened, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Monday. Although they were not obliged to treat Saturday as a lay-day, let us see how they did treat it. The captain went to the consignees, not very late—I think it was early in the morning—and asked them to come and take delivery. They said, "No." They were right; they were not bound, I think; but then they changed their minds, and at one o'clock they do go and take delivery. What is the meaning of that? The captain said, "Come—agree with me to take delivery"; and they did agree to take delivery, and they did it. Is that, or is that not, agreeing to treat Saturday as one of the lay-days? The lay-days for this purpose I may call unloading days. I think the meaning of the proposition was, "Now, come and agree to treat this as an unloading day." They say "No" first, but afterwards they agree to treat it as a lay-day; and if it once is a lay-day, to my mind it does not signify how much of it was left. The whole of that day is a lay-day, and if they neither did nor could take delivery during half of it, still it is a lay-day. I say so because if, for instance, on the Monday or Tuesday, something happens to prevent the consignees taking delivery, as, for example, a storm of rain, so that it would have been dangerous for a cargo of wheat in bulk to be landed over the side of the ship in the pouring rain, because it would have to be dried afterwards or it would be spoilt—that is

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their misfortune. It is the charterer who must pay for anything of that kind; therefore, on the Saturday, if they chose to take it as a lay-day, they must take the whole of it, and the fact that they did not take delivery until one o'clock does not prevent them from having to treat the Saturday as a lay-day.

It must also be borne in mind that it was for the advantage of the consignees to get such a cargo as that out of the ship as soon as possible, for it is a cargo extremely likely to heat of itself, and it is a cargo that will easily damage if wet comes upon it, if the hatches are open. So, also, if shipowners are to use their crew and their materials and implements on a day when they are not obliged to, it is a burden upon their crew.

The matter cannot, therefore, be treated as if it were a mere matter of courtesy. The proper inference to be drawn in this case is that both sides agreed to treat that Saturday as one of the lay-days, and if so, it did not signify how much of that lay-day was or could be employed by the consignees for the discharge of the cargo.

I am obliged, therefore, to disagree with the finding of the learned President, and hold that the lay-days began on the Saturday, so that there were two demurrage days. The appeal will be allowed with costs here and below, and judgment entered for the shipowner for 71*l.* 18*s.* 8*d.*

LOPES, L.J. If nothing had happened on the Saturday, I should, in interpreting this charterparty, have said that days meant whole days, and that the lay-days commenced on Monday; but here what happened was that at 1 P.M. on the Saturday unloading began, in consequence of an arrangement between the shipowner and the consignees, and, as the cargo was wheat, it may well have been an advantage to the consignees to commence unloading without delay.

The result is that, though the consignees might have objected, and were entitled to object, it must be taken that the parties agreed to treat Saturday as an unloading or lay day, and therefore the lay-days terminated on the following Saturday, and this appeal must be allowed.

RIGBY, L.J. I think that the "day" mentioned in clause 7 of the charterparty is what is ordinarily known as a day, and the expressions used in clause 12 do not necessarily or sufficiently indicate that the term is used in the sense of a period of twenty-four hours.

With regard to what took place between the master of the vessel and the consignees, I feel some difficulty. I take it that the shipowner was not bound to deliver, and that the consignees were not bound to receive, on the Saturday. Either might have refused, and the consignees did at first refuse; but instead of waiting until the Monday, the parties came to an agreement involving the waiver by one side of their strict rights, and the unloading did in fact begin at one o'clock in the afternoon of Saturday with the consent of the consignees, possibly owing to considerations as to the nature of the cargo. In the particular and special circumstances of this case, I think there was an intention, as in the case of the *Boston* (1), on the part of both parties to advance the lay-days, and treat Saturday as such a day.

Appeal allowed.

Solicitors for appellant (plaintiff): *Botterell & Roche.*

Solicitors for respondents (defendants): *Field, Roscoe & Co., for Batesons, Warr, & Wimshurst, Liverpool.*

(1) *Commercial Steamship Co.* v. *Boulton*, 3 Asp. M. L. C. (N.S.) 111.

T. L. M.

1893
Nov. 2, 8.

DURHAM AND ANOTHER *v.* NORTHEN AND OTHERS. (1)

Probate—Will—Codicil—Document not referred to as existing.

A testator devised property to trustees in trust to provide an annuity of 3000*l.* for his wife, setting apart certain funds which they would find "noted" by him. He made two codicils confirming the will. After his death a document was found in his handwriting purporting to be instructions to his executors, and containing the words, "The stocks to be set aside to pay my wife the 3000*l.* per annum," followed by a list of securities, the total income from which was stated at 3000*l.* The earliest date which could be attributed to this document was after the will, but before the codicils.

Held, that as the language of the will did not refer to the document as existing, the codicils had not the effect of incorporating it with the documents of which probate was to be granted.

In the Goods of Mary Reid (38 L. J. (P. & M.) 1) followed.

THE plaintiffs, the executors of Abraham Northen, claimed probate of his will and two codicils, and a declaration whether or not a document described as "Instructions to his executors" should be included in or excluded from probate. One of the defendants, the widow of the deceased, claimed that it should be excluded, the others, his infant children, suing by their guardian ad litem, that it should be included.

Bargrave Deane, for the plaintiffs.

Bayford, Q.C., and *Edward Chitty*, for the defendant, the widow.

Inderwick, Q.C., and *T. A. Nash*, for the other defendants.

Cur. adv. vult.

THE PRESIDENT. By his will, dated May 9, 1890, Abraham Northen bequeathed to his wife an annuity of 3000*l.* for life, and then proceeded to devise his real and personal property to trustees upon several trusts, of which the first is thus expressed: "Upon trust to pay thereout all my debts funeral and testamentary expenses, and then in the first place to set apart an adequate sum to provide by the annual interest or income thereof the said annuity of 3000*l.* for my said wife, which setting apart I direct

(1) This case, owing to the illness and subsequent death of Mr. Leycester, was accidentally omitted from [1894] P.

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to consist of funds or investments belonging to me at my decease, and which the trustees will find noted by me for the purpose." The testator made two codicils altering but otherwise confirming this will, on June 29 and July 31, 1891, respectively. After his death, there was found a paper in his handwriting, commencing as follows: "A. Northen gives the following instructions to my executors under my will dated May, 1890. To pay all annuitants until their death such as are now in receipt of an annual amount (payable quarterly). The stocks to be set aside to pay my wife the 3000*l.* per annum;" then follows a list of securities, the total income from which is put down at 3000*l.* This paper was enclosed in an envelope, never fastened down, on which was written, "Instructions to my executors, June 5, 1890. Abraham Northen." The question is, shall this paper be admitted to probate?

It is, I think, extremely doubtful what date is to be assigned to this paper. It goes beyond a mere instruction to the executors, as it makes a new provision as to annuitants; and it may well be that the contents of the envelope were changed from time to time. The earliest date, however, which, in any view, can be attributed to this paper, is June 5, 1890—that is to say, after the will but before the codicils.

The language of the will clearly does not refer to a document as existing. There can be no doubt, therefore, on the principles laid down in *Allen* v. *Maddock* (1), and long since well recognised, that, apart from the effect of the codicils, the paper in question must be excluded from probate. Indeed, there would be no right to inquire after any document outside the will: see *In the Goods of Mary Sunderland.* (2)

But, if the language of the will does not refer to a document as existing, the codicils cannot have the effect of incorporating it with the documents of which probate is to be granted. I do not think that, in the law relating to this matter, there is any real discrepancy between the authorities, especially between the cases of *In the Goods of Lady Truro* (3) and *In the Goods of Mary Reid.* (4) It must, I think, be understood that, in the former of

(1) 11 Moo. P. C. 427.
(2) Law Rep. 1 P. & D. 198.
(3) Law Rep. 1 P. & D. 201.
(4) 38 L. J. (P. & M.) 1.

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those cases, the learned judge considered the words of the will to refer to an existing document, though there was not in fact, at the date of the will, any document to answer such a description. But there was such a document before the codicil was executed; and then not only did the will, treated as re-executed at the date of the codicil, refer to a document as then existing, but there was in existence a document capable of being identified as the one referred to. So every condition of testamentary validity was satisfied. But in the case of *In the Goods of Mary Reid* (1), as in the earlier case of *In the Goods of Lydia Mathias* (2), the will referred, not to an existing, but to a future document. It was, accordingly, clearly held in the former of these two cases, and, I think, also in the latter, that the unexecuted document could not be incorporated, because the will, whenever it was to be treated as executed, did not refer to any document as then existing. The present case, therefore, comes within the decision in *In the Goods of Mary Reid* (1), and testamentary effect cannot be given to the paper in question.

Solicitors: *John H. Hortin; Alderton.*

H. D. W.

1894

Dec. 10, 21.

IN THE GOODS OF ANNE COOKE.

Grant of Administration—Lunacy of Single Administrator—Appointment of Person under s. 116 of Lunacy Act, 1890 (53 & 54 Vict. c. 5), with only Specified Powers—Grant to another of the Next of Kin for the use of the Lunatic Administrator.

Where a single administrator becomes insane, and a person is appointed under s. 116 of the Lunacy Act, 1890, with only specified powers, the Court will make a grant to another of the next of kin for the use of such administrator during his lunacy, impounding the original grant.

ANNE COOKE died on February 5, 1891, intestate, a spinster, without parents, leaving two brothers and two sisters. William James Cooke, one of the brothers, obtained a grant of administration. He had since become insane, but had not been found a lunatic by inquisition. No committee had been appointed, but

(1) 38 L. J. (P. & M.) 1. (2) 3 Sw. & Tr. 100.

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Otho William A. Cooke had been appointed, under s. 116 of the Lunacy Act, 1890, with powers not of a general nature, but relating only to certain specified property of the lunatic. Frederick Cooke, another brother and a next of kin of the deceased, now applied for a grant of administration.

Bargrave Deane, in support of the application, cited *In the Goods of Phillips* (1) and *In the Goods of S. C. D. Lewis* (2), and referred to Williams on Executors, 9th ed. pp. 441, 443.

Cur. adv. vult.

THE PRESIDENT, having stated the facts as above, continued as follows:—

The question is what grant should, according to the practice, be made?

The practice as to administration where a grant has been made to a next of kin, and such next of kin becomes insane, appears to be as follows:—

First, where such a lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic, so long as he shall remain a lunatic. The first grant is not, in such case, impounded.

Secondly, where the lunatic is not so found by inquisition, but, under s. 116 of the Act of 1890, a person has been appointed with general authority over the lunatic's property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic's estate.

Thirdly, if a person appointed under s. 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant.

Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next of kin of the deceased for the use of the lunatic next of kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant

(1) 2 Add. 335. (2) 25 L. T. (N.S.) 510.

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impounded. There is an authority for this practice in the case of *In the Goods of Binckes.* (1)

Fifthly, I am informed that it has not hitherto been the practice to inquire whether the lunatic is likely to recover, and in the event of its appearing that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next of kin. There appears to me to be good reason for this. It must always be doubtful, and often highly doubtful, whether an insane person is or is not likely to recover; and the inquiry whether he be likely to recover may be one attended with considerable difficulty and expense. Nor can I see any practical objection to the grant being limited to the use of the lunatic, so long as he remains such. He is not likely to seek again to act, unless a marked improvement takes place in his condition.

I think, therefore, that the proper course is, in this case, to make a grant to Frederick Cooke as a next of kin of the intestate, limited to the period of the lunacy of the present administrator; and the present grant of administration to the lunatic will be impounded.

The above view is expressed with regard to the case of a single administrator becoming insane. It is not necessary at present to consider the case of a defect in legal representation occasioned by the lunacy of one of several administrators.

Solicitor: *T. Bowker.*

(1) 1 Curt. 286.

H. D. W.

[IN THE CONSISTORY COURT OF NORWICH.]

1894
Nov. 10.

THE VICAR AND CHURCHWARDENS OF ST. JOHN THE BAPTIST, TIMBERHILL *v.* THE RECTORS, IMPROPRIATORS, PARISHIONERS, &c., OF THE SAME.

Ecclesiastical Law—Faculty—Erection in Parish Church of Rood Loft, Rood Beam, and Rood—Wooden Graven Figures on Rood Beam—Refusal of Confirmatory Faculty—Chancel Screen with Gates—Side Screens—Choir Stalls—Reasons for Caution in granting Confirmatory Faculties.

The vicar and churchwardens of a parish church in the diocese of Norwich petitioned the Ordinary to authorize by faculty the retention in the church of the following works introduced into the church since its consecration and without the sanction of a faculty:—

A chancel screen without gates, but surmounted by a loft resting on the top of the screen, four feet wide, and with sides three feet high, to which access was obtained by the old rood-loft stairs. A beam extending across the west end of the chancel at a height of four feet above the chancel screen, and placed upon such beam a figure of Our Lord upon the Cross, and on one side a figure of the Virgin Mary, and on the other side a figure of St. John; all such figures being graven in wood and of about life-size.

And the erection of the following new works:—

The placing upon the above-mentioned beam of two other figures, one to represent Mary Magdalene, and the other a Centurion together with the figure of a Cherub at each end of the beam, the erection of gates to the chancel screen, of screens across the aisles, and of choir stalls with screens behind them.

It appeared that a dedication service had been held in the church on the occasion when the figures on the beam across the chancel had been put up, and that every year on Palm Sunday members of the church choir went into the loft above the chancel screen and sang there.

The Chancellor of the Diocese of Norwich refused to grant a faculty for the retention in the church of the loft over the chancel screen or of the figures placed on the beam above the same—in his opinion a rood loft and rood—or for the erection of the additional figures proposed to be placed thereon, holding that such loft and such figures so placed were unlawful within the ruling of Lord Penzance in *Clifton* v. *Ridsdale* (1 P. D. 316), and matters as to which in the discretion of the Court a faculty ought not to be granted, there being danger of "superstitious reverence" being paid to the rood. Further, the Chancellor decreed a faculty to issue for the chancel screen without the loft surmounting it; for the addition of gates to such screen, for the screens across the aisles with gates attached, and for the choir stalls and screens; evidence being before him that the expense of the works yet to be done would be met by voluntary subscriptions, and that the organ and other property in the chancel and aisles required protection.

THIS was a cause of faculty instituted on behalf of the Rev. John Ram, the vicar, and Robert Reid and Henley Curl, the

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VICAR, &c., OF ST. JOHN THE BAPTIST, TIMBERHILL v. RECTORS, &c., OF THE SAME.

churchwardens of the parish church of St. John the Baptist, Timberhill, in the city and diocese of Norwich, against the rectors, impropriators, parishioners, and inhabitants of the same parish in special, and all others in general having interest, for the purpose of obtaining a faculty to empower the petitioners "to erect two figures on the beam extending across the west end of the chancel of the said church, and execute other proposed works therein, and to confirm the erection of the said screen and other works."

The act on petition in the suit described, in the first two paragraphs thereof, the works, the erection of which in the church the petitioners prayed to have confirmed, and paragraphs 3, 4, and 5 of the same contained a description of the new works which the petitioners proposed to erect. The substance of these five paragraphs was so far as material as follows:—

1. There is in the said church a screen of wood between the chancel and the nave, having six open panels surmounted by light tracery, and in no way interfering with the transit of sound or with the view of the said chancel.

2. Above the said screen is a beam extending across the west end of the chancel at a height of four feet above the said screen, upon which are placed a figure of Our Lord upon the Cross, and on one side a figure of the Virgin Mary, and on the other side a figure of St. John. The said figures are of wood.

3. It is desired to place upon the said beam two other figures of wood, one representing St. Mary Magdalene and another representing a soldier or centurion, and at each end thereof a figure of wood representing a cherub.

4. It is desirable, for the purpose of affording protection for the organ, ornaments, and other church property in the chancel and the part of the north and south aisles on each side of the chancel, to place low wooden gates not exceeding four feet and one inch in height at the entrance of the present screen, and to place screens of oak across the north and south aisles of the church in a line with the present screen.

5. It is also desired to place on each side of the chancel, stalls or seats of oak for the use of the choir and clergy, with open screens of wood behind them and having entrance gates or doors

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opening on each side of the chancel to the east of the said seats.

1894. Oct. 12. The suit was heard before the Chancellor of the Diocese of Norwich (Thomas Calthorpe Blofeld, Esq.). (1)

All three petitioners were called as witnesses in support of the petition. (2) They gave evidence orally in Court to the effect that a meeting of the parish vestry, held July 6, 1893, had unanimously approved of the plans of the proposed works and of the faculty being applied for; that the expense of the proposed works would be met by voluntary subscription; that the church was open daily from 7 A.M. to 5 to 8 P.M. for private prayer, and books belonging to the choir and the vicar were left in the chancel; the organ being, moreover, on the east side of the proposed screen in the north aisle, and a second Holy Table at the east end of the south aisle; and that there had been a dedication service of the rood held in the church on June 24, 1893, on the occasion when the three figures of Our Lord, the Virgin Mary, and St. John had been put up on the beam across the chancel; and every year, on Palm Sunday, three boys belonging to the church choir ascended into the loft on the top of the chancel screen and there sang the hymn, "All glory, laud, and honour to Thee, Redeemer, King."

The result of the remainder of the evidence, including that of one of the architects employed in connection with the works in the church, appears from the judgment.

Sir Walter Phillimore, Hansell, and *H. C. Richards,* appeared for the petitioners. First, with respect to the loft over the chancel screen, the figures already placed on the beam above such screen, and the additional figures proposed to be placed there, it may be admitted that the loft and existing figures are substantially the same as a rood loft and rood with this exception, that the figures in

(1) The Court sat in Norwich Cathedral in the Beauchamp Chapel.

(2) According to the practice of the Consistory Court of Norwich, the evidence of each witness was written down by the registrar, and after having been read to the witness, and found to have been accurately taken down, was signed by such witness, the Chancellor afterwards authenticating the whole of the depositions as sworn before him.

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St. John's Church are placed so high up above the loft that they could not be crowned or decked, &c., therefrom, as was the case with the roods formerly in use. The petitioners, however, contend that rood lofts and roods are not now necessarily unlawful, and that in every instance it is a question for the discretion of the Court whether each rood, or crucifix, or collection of figures forming an historical subject is in danger of being abused or having superstitious reverence paid to it or them: *Phillpotts* v. *Boyd* (1); *Clifton* v. *Ridsdale* (2); *Hughes* v. *Edwards* (3); *In re St. Lawrence, Pittington* (4); *The Queen* v. *The Bishop of London.* (5) In each instance the answer to this question must depend upon the surrounding circumstances of the case before the Court. Thus in *Clifton* v. *Ridsdale* (2) Lord Penzance, in deciding that the figure on the cross on the chancel screen in that case ought to be removed, evidently took into consideration that the defendant in that case was charged with having set and retained in his church "The Stations of the Cross" (held by the Court to be unlawful pictures), and with having had in the church unlawful processions which passed under the chancel screen, and the Privy Council expressly based their decision on that ground. The rood in the present case, either with or without the addition of the figures proposed to be erected, should be either viewed as an architectural decoration, adding to the attractions of the church, or as an historical representation of one of the great facts of Christian history or a portrayal of the doctrine of the Atonement. In either view, this rood and these figures are not in danger of being abused. The old roods were undoubtedly abused at the time when they, together with the rood lofts then in use, and all such images in churches as were ordered to be destroyed under the 3 & 4 Edw. 6, c. 10, were taken down. [They referred to *Phillpotts* v. *Boyd* (6).] But it is clear that, as was observed in *Westerton* v. *Liddell* (7) and *Phillpotts* v. *Boyd* (1), the Act of 3 & 4 Edw. 6, c. 10, only related to images already abused and ordered to be removed at the time of

(1) Law Rep. 6 P. C. 435.
(2) 1 P. D. 316, 349; 2 P. D. 276.
(3) 2 P. D. 361.
(4) 5 P. D. 131.
(5) 24 Q. B. D. 213; [1891] A. C. 666.
(6) Law Rep. 6 P. C. 435, at p. 457.
(7) Moore's Special Report.

its passing. This being so, a rood set up at the present day is not per se illegal or struck at by any statutory regulation, and unless it is known from the surrounding circumstances or services of the particular church that it will be abused, a faculty for its retention or erection ought not to be refused. In fact, there are two recent instances of parish churches where what are in effect roods have been erected under lawful authority—that of All Saints, St. Ives, where, under a faculty from the Chancellor of Ely, the figures of Our Saviour and the Virgin Mary and St. John were represented on the organ placed on the chancel screen (1); and that of St. Peter's Church, Staines, consecrated on July 28, 1894, with a very lofty chancel screen, having on it similar figures to the principal ones in the present case. (2) By the erection on the beam of the additional figures proposed, less doubt than ever can exist as to the figures forming a representation of an historical group not likely to be abused by superstitious reverence, whilst the petitioners are willing to be guided by the opinion of the Court as to the retention of the rood loft.

Secondly, the chancel screen, the gates thereto, and the screens to the aisles, are required and ought to be authorized on the ground of utility for the reasons given in the recent decision of the Chancellor of the diocese of London in *The Vicar and Churchwardens of St. James Norland* v. *The Parishioners of the Same* (3), and for the further reason that in one of the ends of the aisles proposed to be screened off is a second Holy Table, and church property connected with the services held there, requiring protection. [They referred to Perry's Lawful Church Ornaments, p. 348.]

The erection of the proposed choir stalls and screens is a work to which no objection can be taken.

No opponent appeared to oppose the grant of the faculty as prayed.

Cur. adv. vult.

(1) The registrar of the diocese of Ely being called as a witness on behalf of the petitioners at the hearing, identified the faculty mentioned above and granted on December 30, 1893, and produced the plans for the screen authorized to be erected under such faculty.

(2) See the *Illustrated Church News* of August 4, 1894, for a description and drawing.

(3) [1894] P. 256.

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1894. Nov. 10. THE CHANCELLOR. This was an application by the vicar and churchwardens of the parish of John the Baptist, Timberhill, in the city of Norwich, for a faculty, partly to confirm work already done in the church of that parish, and partly to authorize the doing in it of further work.

The work already done was described by the applicants, in the act on petition, as consisting of—"A screen of wood between the church and the nave, having six open panels surmounted by light tracery, and of a beam above the screen extending across the west end of the chancel at a height of four feet above the said screen, upon which are placed a figure of Our Lord upon the Cross, and on one side a figure of the Virgin Mary, and on the other side a figure of St. John."

As a matter of fact, the screen was also surmounted by a passage or loft, which rested on the canopied top of the screen. It was approached by the old rood stairs in the wall of the church, and had sides about three feet high, and a space of four feet intervened between these sides and the above-mentioned beam. This passage, or rood loft, was not mentioned in the act on petition; perhaps it was thought that it was covered by the word "screen."

The figures on the beam were graven in wood, painted and gilded, and were of about life-size.

The Court should, I think, be very careful in its investigation of cases in which confirmatory faculties are asked for. When important alterations in or additions to a church are contemplated, it is obvious that a faculty authorizing them should be obtained before the work is begun; to carry out the work without authority, and then, perhaps, only to apply for a confirmatory faculty when compelled to do so, opens the door to abuse, and should not be encouraged; and it should be remembered that to do work requiring a faculty without one exposes the doer to be proceeded against by articles for an ecclesiastical offence. In this case the screen and loft were stated by Mr. Ram, the vicar, to have been put up in 1890; and there is no doubt that the then bishop of the diocese (Bishop Pelham) saw him upon the subject. I do not think I am at liberty to import any knowledge of my own into this case, but I cannot help thinking that Mr.

Ram is mistaken when he says that Bishop Pelham sanctioned the loft, and that he must have misunderstood his lordship.

A cross was put up, and, I presume, the beam upon which it stood, at Christmas, 1892; and in June, 1893, after Bishop Pelham's resignation, and before his successor, the present Lord Bishop, entered on his office, the figures now in question were placed on the beam, not only without the sanction of a faculty, but without any intimation by Mr. Ram to his ecclesiastical superiors of what was being done; and he now comes here, on the urgent pressure of his bishop, to ask the Court to determine whether the work he has carried out should be sanctioned or not. I have felt bound to criticise the way in which this case is brought before the Court; but I shall, of course, not allow that in any way to prejudice my decision of the application itself.

The work still to be done is stated to consist of the placing upon the beam of two other figures—namely, those of Mary Magdalene and a Centurion, one on each side of the existing figures, together with a figure of a Cherub at each end of the beam; of placing gates at the entrance into the chancel through the existing screen; of placing similar screens across the north and south aisles in a line with the present screen; and of the erection of open stalls in the chancel for the clergy and choir, with open screens of wood behind them.

The placing of the additional figures on the beam I will consider together with the question as to the existing structure. The question of the new screens, the screen gates, and the choir stalls I will consider separately.

The first question, therefore, is whether the Court can sanction, and, if so, whether it ought to sanction, the screen, with the passage over it, and the beam with the figures now, or hereafter intended to be, placed upon it.

I find that the rood in Pre-Reformation times was a crucifix, or cross, with the figure of Our Saviour on it, often of life-size and beautifully sculptured, and that it was not considered complete without the figure of the Virgin Mary standing on one side of it and that of St. John on the other, in allusion to St. John's Gospel (chap. xix. v. 26); that these figures were placed in or

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over a loft at the entrance from the nave to the chancel, and that the loft was generally over an open screen, and was formed by the screen being canopied, so as to leave a passage on its top: Parker's Glossary of Architecture, voce Rood, &c., vol. i. pp. 391, 392.

Sir Walter Phillimore, who most ably and learnedly argued the case for the applicants, admitted that there was no difference structurally between what was sought to be legalized in this case and the old roods and rood lofts in general use in Pre-Reformation times, unless perhaps that the beam was rather higher (four feet) than formerly above the loft; but he strenuously contended that crucifixes or roods in parish churches were now lawful, and should be sanctioned, unless there were something in the surrounding circumstances of the particular church or its services leading to the conclusion that they might be abused.

The history of rood lofts in this country is a very chequered one. They do not appear to have been in use here before the fourteenth century, nor general till the fifteenth: Parker's Glossary of Architecture, vol. i. p. 392.

Lights were generally kept burning in them, and from them the rood itself was kept crowned, adorned, or veiled, as the season might require.

The worship of the rood was enjoined by the Sarum use which prevailed over the greater part of the country [" Quasi tota provincia (Cantuariensis) hunc usum sequitur " (Lindwood, lib. ii., tit. 4, p. 104; Gibson's Codex, 259)], and particularly on Palm Sunday, when, as pointed out by Lord Penzance, in *Clifton* v. *Ridsdale* (1), a very elaborate service ended with the adoration of the rood by the celebrant and choir before passing into the chancel, and I find, on reference to the Sarum Missal (Missale ad usum insignis et praeclarae Ecclesiae Sarum, Burntisland, 1861, p. 262), that this was in connection with "The Stations of the Cross," and that the hymn, " Gloria, laus et honor Tibi sit, Rex Christe Redemptor " was sung by boys " in loco eminentiore," which I take it perhaps may be the rood loft, and Mr. Ram stated that the English version of this hymn was sung by the boys of his choir in his rood loft on Palm Sunday. Beyond all

(1) 1 P. D. 316, at p. 355.

doubt, before the Reformation the roods were almost universal, and they were greatly abused; and in one case, at least, that of the Rood of Bixley, commonly called the Rood of Grace, there was an artificial contrivance of wires inside the body, by which the eyes, lips, &c., were moved, to the great wonder and astonishment of the common people: Heylyn's History of the Reformation, vol. i. p. 18, Cambridge, 1849.

In 1546 Henry VIII. seems to have been determined to pull the roods down, but postponed doing so for State reasons, as the proposed league between him and the Emperor Charles V. and the French King Francis I. would not go forward if any other changes were made in religion or ceremonies than theretofore had been commenced and done: Archbishop Cranmer's Miscellaneous Writings, Parker Society's Publications, p. 415, note 5.

In 1547 (1 Edw. 6) an injunction was issued by Protector Somerset, I believe under statutory authority, for the general purification of churches, which was followed by the "mandatum" of 1548, and in accordance therewith roods were laid low: Froude, History of England, vol. v. p. 56; Heylyn's History of the Reformation, vol. i. pp. 70, 73, 84.

Then, by statute 3 & 4 Edw. 6, c. 10, images in churches were declared illegal. This statute was repealed by 1 Mary, st. 2, c. 2, and revived by 1 Jac. 1, c. 25, s. 48; but it was stated by the Privy Council, in *Phillpotts* v. *Boyd* (1), that the Act was spent upon the definite purposes to which it was directed, and was not intended to make provision for subsequent use or abuse of any other images. In 1553 (1 Mary) the roods are stated to have been set up again; and I find in Heylyn's History of the Reformation, vol. ii. p. 112, that when the Queen's marriage was past, Bishop Bonner having restored the Mass, "with all the pomps and rites thereof," and "having by that time prepared a fair and large image of Our Saviour, which they called the Rood, caused it to be laid along upon the pavement of St. Paul's quire, and all the doors of the church to be kept close shut, whilst he, together with the Prebendaries, sung and said divers prayers by it. Which done, they annointed it with oil in divers places, and after the annointing of it crept unto it and

(1) Law Rep. 6 P. C. 435, at p. 462.

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kissed it, and after weighed it up, and set it in its accustomed place; the whole quire in the meantime singing Te Deum, and the bells publishing their joy at the end of the pageant. After which a command is given to Dr. Story (who was then Chancellor of his diocese, and afterwards a most active instrument in all his butcheries) to visit every parish church in London and Middlesex, to see their rood-lofts repaired, and the image of the crucifix, with Mary and John, to be placed on them." If further proof were needed that the rood was generally restored in the reign of Queen Mary, it is, I think, to be found in Bishop Bonner's Articles of 1554 and Cardinal Pole's Articles of 1557.

In 1559 Queen Elizabeth published Injunctions, and directed a Visitation by Royal Commissioners, "In pursuance whereof both the commissioners and the people shewed so much forwardness that, on St. Bartholomew's Day and the morrow after they burned in St. Paul's Churchyard, Cheapside, and other places in the City, all the roods and other images which had been taken out of the Churches": Heylyn, History of the Reformation, vol. ii. p. 302; and in 1561 there was issued by the Queen's Commissioners, under the Great Seal for causes ecclesiastical, by virtue of her Majesty's letters addressed to them, an order for altering of rood lofts yet remaining untransposed, "so that the upper part of the same, with the soller, be quite taken down, unto the upper parts of the vautes, and beam running in length over the said vautes, by putting some convenient crest upon the said beam towards the church": Heylyn's History of the Reformation, vol. ii. p. 361.

Whatever the authority for issuing this order may have been, it is abundantly clear that under Elizabeth the roods were, as a fact, all removed. It is true that Elizabeth, for a time, retained a crucifix upon the altar in her own chapel (1), and it is stated by Mr. Froude that she wished to reintroduce the crucifix into parish churches; but I think it is now generally agreed that her motive really was political, as she was seeking to obtain the alliance of the King of Spain against Mary Queen of Scots and the King of France, and was anxious to persuade him that the measures she had taken against the Roman Catholic religion

(1) See Froude, History of England, vol. vii. p. 144.

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were really those of her people, and not of herself. Be this, however, as it may, it seems clear that the rood was everywhere abolished by Queen and people under Elizabeth, and that for three centuries it has not been put up again. The question is—Can it lawfully and properly be put up again to-day?

It was argued by Sir Walter Phillimore that the figures in the present case were either an architectural adornment of the church or merely a conspicuous representation of the Atonement, one of the three great facts of Christian history; that the Injunctions of Edward VI. only applied to images that had been abused, although the "mandatum" ordered the removal of all then in existence, whether they had been abused or not (1); that the Injunctions of Elizabeth carried the matter no further; and that the 22nd Article of Religion condemned only the abuse of images, and he urged that a rood was not unlawful, and that if its erection were unopposed it should be sanctioned, unless from the circumstances of the case it seemed likely to be abused.

It seems to me that the decision of Lord Penzance in *Clifton* v. *Ridsdale* (2), which was affirmed by the Privy Council (3), and which is, of course, binding on me, really governs this case. There a metal crucifix, eighteen inches high, on the top of a metal chancel screen, with candles on each side of it, was held unlawful as being in danger of becoming an object of superstitious reverence. It may be true, as argued before me, that the test of legality is, not whether any statutory enactment, or anything in the nature of an injunction, has been infringed, but whether the particular image is likely to be abused considering its place, its history, and the circumstances of the present day, and of the particular church. Lord Justice Lindley, in *The Queen* v. *The Bishop of London* (4), says: "But what is legal or illegal with respect to images . . . in churches depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship in the place where they

(1) Latin letter of Archbishop Cranmer, dated July 24, 1547–8. See *Boyd* v. *Phillpotts* (Law Rep. 6 P. C. 435, at pp. 458–459), where this "mandatum," headed "mandatum ad amovendas et delendas imagines," is set out.

(2) 1 P. D. 316.

(3) 2 P. D. 276.

(4) 24 Q. B. D. 213, at p. 267.

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are or are to be put." At the same time, I am aware that it has been contended that the order of 1561, above referred to, was a statutory order under the Act of Uniformity, having equal validity with the Advertisements of 1566, which have been held by the Privy Council in *Clifton* v. *Ridsdale* (1) to be a "taking of order" within the Act by the Queen with the advice of the Metropolitan, and to be still of legal force. This point was not argued before me, and it is not necessary, I think, that I should express an opinion upon it, for it seems to me that the reasons given in *Clifton* v. *Ridsdale* (2) for thinking that the crucifix there in question might be in danger of receiving superstitious reverence apply in full force to the present case.

By "superstitious reverence" I mean, not the actual worship of the image, which the Church of Rome itself never inculcated, but, in the words of Lord Penzance in the last-mentioned case (3), "the far more extended conception of worship, adoration, or reverence paid to the Deity in the presence of or before those objects or figures, including "all and every form or degree in which the object in question is made to take a place or play a part in the devotions which are paid to the Deity before it": and see *In re St. Lawrence, Pittington.* (4) There is, to my mind, a great distinction between the case of a reredos, as in *Hughes* v. *Edwards* (5) and *Phillpotts* v. *Boyd* (6), and that of a rood. A reredos is, generally speaking, a modern ornament of our parish churches—it is an ornament only, and has never been abused; whereas the rood has an evil history of its own, and has in times past been very much abused, as it is to this day in Roman Catholic churches; and it must not be forgotten that the past is good evidence of what may be possible in the future. When it is sought after an interval of three centuries to erect a rood after exactly the old pattern, in exactly the same place as before, and for no purpose arising out of the authorized services of the Church, one may well doubt whether it is intended to be, or will be taken to be, a mere architectural decoration. No doubt it is true that all crosses were at one time directed to be removed

(1) 2 P. D. 276.
(2) 1 P. D. 316.
(3) 1 P. D. 316, at p. 352.
(4) 5 P. D. 131.
(5) 2 P. D. 361.
(6) Law Rep. 6 P. C. 435.

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from churches, and that, circumstances having altered, they may now be erected in them as emblems of the Christian faith and architectural decorations, provided they be not used as objects of superstition: *Westerton* v. *Liddell.* (1) A wide distinction, however, has always been drawn between a cross and a crucifix, and it is obvious that the latter is much more liable to abuse, and on this point I cannot do better than cite the words of Lord Penzance in *Clifton* v. *Ridsdale* (2):—

"Is it really so absurd, as it was argued to be, to imagine that in the present day the worship of lifeless images and figures, not as idols perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded; but I question whether intellectual culture can be relied upon as a safeguard against it; for, if so, what is to be said of the Romish Church, and of those able and distinguished men who, in our own day, have not hesitated to join it and accept its doctrines. What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms, as inculcated in the devotional books of the Roman Catholic creed. This is the "fond thing vainly invented" of the Twenty-second Article of Religion, and the mere fact of the existence of such a doctrine in that Church, among whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all—not for a class—and if the crucifix, placed as it is in this instance, is lawful for St. Peter's Church, it is lawful for every parish church in the country, and may be provided for every congregation—strong-minded or weak—instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to our Lord comes to be habitually paid immediately before a sculptured figure of

(1) Moore's Special Report. (2) 1 P. D. 316, at pp. 356, 358.

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His body on the Cross, which arrests the eye and occupies the imagination while the mind is in the attitude of prayer, it may be easy to some and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer, and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts and exalting religious fervour, which can hardly be rejected by those who most feel the want of it, and to whom all abstract thought is a difficult exercise. When there cease to be any such, the peril may cease also; but, until then, it is impossible, I think, to accept the alleged robust temper of the present times as a safeguard against so obvious a temptation."

It was argued that in *Clifton* v. *Ridsdale* (1) the Privy Council held that "under the circumstances of the case" no faculty ought to be granted for the crucifix there in question, and that the circumstances so alluded to could only mean the processions and the representation of the Stations of the Cross, which were also charged against Mr. Ridsdale, and that there were no such circumstances in the present case. Mr. Ram admits, however, that to some extent he has adopted the Sarum use, and from a copy he has been good enough to send me of the words sung in his rood loft on Palm Sunday, it appears that they are besides the English version of the hymn "Gloria, laus et honor," &c., above referred to in *Clifton* v. *Ridsdale* (1) as being sung in connection with "The Stations of the Cross," a translation of certain antiphons in the Sarum processional, which were used when the flowers and palm branches were blessed on Palm Sunday. See Processionale ad usum Ecclesiae Sarum, printed by McCorquodale at Leeds, 1882; Dominica in ramis Palmarum, pp. 47, 48. The application before me was unopposed, and therefore I know very little of the practice at this church. The preface to the Book of Common Prayer says that there had theretofore been great diversity in saying and singing in churches, some following the Sarum and some other uses, and declares "now from henceforth all the whole nation shall have but one use"; and when the Sarum use is in part at all events adopted it cannot, I think,

(1) 1 P. D. 316; 2 P. D. 276.

be said that there are no "circumstances" such as it was argued the Privy Council took into consideration in the *Ridsdale Case.* (1)

In the course of the argument, I asked whether there was any instance of a faculty having been granted for a rood and loft since the Reformation, and I was referred to a faculty granted on December 30, 1893, in the diocese of Ely, for the erecting an organ on a chancel screen at St. Ives, with a figure of Our Saviour on the Cross in relief upon the organ, and with two other figures, one on each side of it. It was also stated that the other day St. Peter's Church, at Staines, had been consecrated by the Bishop of Marlborough, after the attention of the Bishop of London had been called to a lofty open screen surmounted by a figure of Our Saviour on the Cross, with other figures on each side of it. Both these structures differed much from the old rood and rood loft; and even if it were otherwise I should not consider them as precedents to be followed. I have, therefore, come to the conclusion that as regards the rood this case is in substance undistinguishable from *Clifton* v. *Ridsdale* (2), and is governed by it; and further, that if the case is one in my discretion, the faculty ought not to be granted, as there is danger of superstitious reverence being paid to the rood in the sense I have above indicated.

The remaining question is whether a faculty should be granted for the erection of gates in the present screen, for the erection of additional screens across the aisles, and for the erection of choir stalls with open screens of wood behind them. In *Beal* v. *Liddell* (3), Dr. Lushington, though refusing to order the removal of the brazen gates in the screen of St. Barnabas Church, Pimlico, on the ground that they were not clearly illegal and were there at the time of consecration, expressed a strong opinion against them, and stated that he would not advise a bishop to consecrate a church so fitted up. In *In re St. Augustine's, Haggerston* (4), Dr. Tristram, in the Consistory Court of London, stated that since *Beal* v. *Liddell* (3) it had been the practice of his Court not to issue faculties for gates in screens, and as the gates there

(1) 1 P. D. 316; 2 P. D. 276.
(2) 1 P. D. 316.
(3) Moore's Special Report, at p. 77.
(4) 4 P. D. 111.

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proposed were apparently for the purpose of exclusion, and to signify that the chancel was of a sacred character distinguishable from that of the rest of the church, he refused to authorize them. In *Bradford* v. *Fry* (1) Lord Penzance, in the Court of Arches, took the same view.

In the subsequent case, however, of *St. James Norland* (2), Dr. Tristram granted a faculty for the erection of a screen with gates, on being satisfied that it would be of utility; and he refers to a case, *Re the Church of St. John, Isle of Dogs* (3), in which he had done the same thing before; and he points out that in *Bradford* v. *Fry* (1) no special grounds were assigned for the addition of the gates, whereas in the case before him it was shewn that of recent years it had been the custom in many crowded districts to throw the churches open all day for private prayer, and that it had become necessary to protect the books and other property in the chancel.

In the present case the gates were asked for on this ground only, and there was no suggestion that they were wanted for any other purpose.

In the result, a faculty to confirm the erection of the rood loft and of the figures at present on the rood beam, and to authorize the placing of the other figures there, will be refused.

A faculty to confirm the erection of the chancel screen without the rood loft, and to authorize the placing of gates in the existing screen; the erection of the proposed side screens, with gates in them, and the erection of the choir stalls and screens behind them, will be granted.

Proctor for petitioner: *Jenkins.*

(1) 4 P. D. 93. (2) [1894] P. 256.

(3) Tristram's Reports, p. 67.

C. F. J.

YOUNG *v.* HOLLOWAY AND ANOTHER. 1894

Probate—Practice—Res inter alios acta—Validity of Will—Cognizance of the Proceedings and Power to Intervene. *Dec.* 11, 16.

A person who is not a party to proceedings in the Probate Division in which the validity of a will is questioned is bound by the result only if he was cognizant of the proceedings, and had a right to intervene.

An action was brought for the revocation of the probate of a will which the Court in a previous action had held to be valid. The plaintiff was cognizant of, and had assisted the plaintiff in, the previous action; but, according to his affidavit, he had not then, so far as he knew, any interest in the suit and could not, therefore, have intervened. His case was that the will which had been declared valid was a forgery, and that he was a legatee under an earlier will which there had been a conspiracy to suppress, but that these facts had only come to his knowledge since the previous action. It appeared that the earlier will was not likely to be produced at the trial:—

Held, that the plaintiff was not bound by the result of the previous action, and that the action brought by him ought not to be dismissed as frivolous.

MOTION on behalf of the defendants, the executors of the will of Thomas Holloway, dated October 11, 1883, to dismiss the action.

It appeared that in May, 1887, an action had been tried in the Court, in which the validity of the will had been disputed on the grounds that it was not duly executed, and that the testator was not of sound mind, and had been subjected to undue influence. This action had been brought by Caroline Young, the sister, and one of the next of kin of the testator, against the present defendants as the executors and Mary Anne Driver, the sole legatee, and the Court had then pronounced in favour of the will.

The present plaintiff, William Henry Young, was the son of Caroline Young, the plaintiff in the former action, and he in this action claimed revocation of the probate of the will of 1883, according to the citation, as "the lawful nephew and one of the next of kin of the deceased and as being interested in his personal estate under a former will executed by him on or about April 20, 1876."

In an affidavit the plaintiff described himself as "a legatee," and stated that he had not been a party to the previous action,

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and could not have intervened in it, as the evidence, on which he sought to impugn the will of 1883, had only just come to his knowledge. He gave some particulars as to the preparation of the will of 1876, and stated his "belief that he was therein named as devisee and legatee of certain real and personal property." He alleged that "this will and the drafts and papers connected with its preparation were not disclosed by the defendants in their affidavit of scripts" in the previous action, and that the signature of the testator to the will of 1883 was a forgery.

The plaintiff's allegations as to the preparation and effect of the will of 1876 were supported by the affidavits of a solicitor's clerk and a law-stationer, and that as to the forgery of the will of 1883 by the affidavit of an expert in handwriting.

It appeared from the affidavits that the will of 1876 was not likely to be produced at the trial.

Henry Addison Hutchings, the grandnephew of the testator, claimed to intervene.

Sir E. Clarke, Q.C., and *Bayford, Q.C.* (*Bargrave Deane*, with them), for the defendants. The action should be dismissed as an abuse of the process of the Court. The citation is inconsistent with the plaintiff's affidavit, and the amount of the alleged legacy is not stated. The claim is obviously fictitious and a mere pretext for extortion. The plaintiff was also a party to the former action. [They cited *Newell* v. *Weeks* (1), *Ratcliffe and Another* v. *Barnes* (2), *Wytcherley* v. *Andrews* (3), and *Lawrance* v. *Norreys*. (4).]

R. H. Pritchard, (with him, *Willis, Q.C.*), for the plaintiff. The plaintiff is entitled to bring the action. He could not have intervened in the former action, and the cases cited shew that, this being so, he is not bound by the result.

Inderwick, Q.C., for the Corporation of London, who were mentioned in the plaintiff's affidavits as having an interest under the earlier will, said that he was instructed to take no part in the argument.

Cur. adv. vult.

(1) 2 Phillim. 224.
(2) 2 Sw. & Tr. 486.
(3) 2 P. & D. 327.
(4) 15 App. Cas. 210.

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THE PRESIDENT delivered the following written judgment:—

This is an application on behalf of the defendants to dismiss the action with costs, and stay all further proceedings.

The action is brought to try the validity of the will of Thomas Holloway, dated October 11, 1883. That will was established at a trial, before Sir Charles Butt and a special jury, on May 27, 1887. In that action, the person disputing the will was the mother of the present plaintiff, and was a sister and one of the next of kin of Thomas Holloway. It is abundantly clear to me that the present plaintiff was fully cognisant of, and assisted in, these proceedings. But it is also clear that, according to his affidavits, he had not then, so far as he knew, any interest in the suit, and could not have intervened. He says that, in fact, he had an interest as being a legatee under an earlier will of 1876, but that this has come to his knowledge only since the trial in 1887.

This state of facts gives rise to the first question to be decided. It was argued that, by reason of his connection with the suit in 1887, he is bound by its result. But, on the authorities, while it appears to me to be well established that if a person who can himself intervene, and take part in proceedings in which a will is questioned, abstains from doing so, he is bound by them, though he be no party to them, it would seem that the reason for this rule is that such a person has the power to intervene.

In the case of *Newell* v. *Weeks* (1), the leading case on the subject, one of the next of kin, who was fully cognizant of proceedings in which a will was contested by other next of kin, was held bound by the decision. But the ratio decidendi of the judgment of Sir John Nicholl is, I think, expressed in this passage: "Spectators to the whole and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privity to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance. In the former cause they had not only a right, but it was their duty to intervene if they meant not to abide by the decision—their interests

(1) 2 Phillim. 224, at p. 233.

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were directly affected: if the will had been set aside they would have established their claim. The lis pendens served as a public notice on which they were bound to act." This case was followed in *Ratcliffe and Another* v. *Barnes* (1), in which Sir Cresswell Cresswell said: "The general principle, as I collect it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision. That was not a mere dictum, but the express decision of a very learned judge, Sir John Nicholl." In the case of *Wytcherley* v. *Andrews* (2) Lord Penzance drew a distinction between a person being bound by the decision in a suit and by a compromise made between the parties to it, and in the course of his judgment said: "There is a practice in this Court, by which any person having an interest may make himself a party to a suit by intervening, and it was because of the existence of that practice that the judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case." The learned judge proceeded, indeed, to illustrate this rule by reference to the practice in Chancery of allowing one member of a class of persons having common interests to represent the whole. Perhaps the principle on which these representative actions are permitted is somewhat different from that of the rule in the Probate Court; but I think that Lord Penzance clearly intended to lay down that, in the Probate Court, the rule of a person being bound by proceedings to which he was no party depends on his cognizance of the proceedings, and his capacity to make himself a party; and further than this I do not think the authorities go.

I think, therefore, that as the present plaintiff could not, so far as he knew, have intervened in the proceedings in 1887, though fully cognizant of them, he cannot be held bound by them.

There are two further points to be considered.

First, is the case now intended to be set up against the will so clearly frivolous that to put it forward would be an abuse of

(1) 2 Sw. & Tr. 486. (2) 2 P. & D. 327.

the process of the Court? The plaintiff says in his affidavits that what he purposes to prove is not a repetition of the case set up in 1887, but an allegation that the will is a forgery. I will not examine in detail the evidence by which he suggests he will seek to prove this, because it may be my duty to try the case. I will only say that I cannot, on the evidence as it stands, hold it to be frivolous.

Secondly, is the evidence by which it is proposed to shew that there was an earlier will of 1876, and that under it the plaintiff took a benefit as legatee, frivolous? This lies, of course, at the foundation of the plaintiff's present proceedings; because, inasmuch as he cannot assert any right as next of kin, or as entitled in distribution, he has no interest to oppose the will of 1883, unless he can establish a former will in his favour. I have had doubts on this point, especially because, apparently, no will of 1876 is likely to be forthcoming, and the plaintiff will have to produce strong evidence of its execution and contents. In the words of Lord Herschell, in *Woodward* v. *Goulstone* (1), "In order to support a will propounded, when it is proved by parol evidence only, the evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there are really before one substantially the testamentary intentions of the testator." At present the plaintiff produces some evidence to establish the existence of such a will containing a legacy to him, and a conspiracy to suppress it; but there is nothing to indicate the amount of such legacy, nor, except in a very general way, the contents of the will. If, however, there be any truth in the statement that such a will was prepared in the manner alleged, it may possibly be that further details of its contents may come to light. It is so important not to shut out a litigant from what may, even possibly, be the assertion of a just right, that I cannot take on myself, at this stage, to say that this part of the case is so clearly frivolous that I should stop the proceedings.

If it had been desired by the present defendants, I should have ordered that this question of the plaintiff's interest should be tried first; but they prefer that the whole matter should be tried at once.

(1) 11 App. Cas. 469, at p. 475.

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It is not necessary to refer to any rights of Henry Addison Hutchings in this matter, because he has not yet established his right to intervene.

The motion will, therefore, be dismissed, but the question of costs will be reserved.

Solicitors: *Douglas Norman & Co.; Clarkson, Greenwells & Co.*

H. D. W.

1894 *Dec.* 17; 1895 *Jan.* 21.

MEREDYTH *v.* MEREDYTH AND LEIGH.

Divorce—Variation of Settlement—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

By a settlement on his marriage with the respondent, the petitioner settled certain property on himself for life, with remainder to the sons of his marriage with the respondent, with remainder to the sons of any subsequent marriage, with remainder to a brother of the petitioner and the sons of that brother, with remainder to the daughters of the petitioner and the respondent, and with ultimate remainder to himself. The marriage, of which there was no issue, had been dissolved on the ground of the misconduct of the respondent, and the brother of the petitioner had died unmarried:—

Held, that, under s. 5 of the Matrimonial Causes Act, 1859, an order might be made for the reconveyance of the property to the petitioner for his own use.

APPLICATION by the petitioner, Sir Henry Bayly Meredyth, Baronet, whose marriage with the respondent had been dissolved on the ground of her adultery with the co-respondent, under s. 5 of the Matrimonial Causes Act, 1859 (1), for an order upon the trustees of his marriage settlement for the reconveyance to him absolutely of the settled property. The material terms of the settlement are stated in the judgment.

Inderwick, Q.C., and *Priestley*, for the petitioner. The application should be granted. It might not succeed in the Chancery Division, as the settlement contains a trust for the benefit of the

(1) By s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), "The Court after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit."

sons of a subsequent marriage: see *Johnson* v. *Legard* (1); *Clayton* v. *Earl Wilton* (2); *Gale* v. *Gale* (3); *Paul* v. *Paul* (4); though *Hastings* v. *Orde* (5) is, it is suggested, in the petitioner's favour. In the events which have happened, the petitioner is the only living person interested under the settlement; and by the express terms of s. 5 (6) the Court can order the application of the whole settled property for his benefit.

Cur. adv. vult.

THE PRESIDENT delivered the following written judgment:—

By a settlement on his marriage with the respondent, the petitioner in this case settled certain property on himself for life, with remainder to the sons of his marriage with the respondent, with remainder to the sons of any subsequent marriage, with remainder to a brother of the petitioner and the sons of that brother, with remainder to the daughters of the marriage of the petitioner and the respondent, and with ultimate remainder to himself. The marriage has been dissolved, there is no issue of it, the brother has died unmarried, and I am now asked, under s. 5 of the Matrimonial Causes Act, 1859, to make an order which will have the effect of putting an end to the settlement and restoring the property affected by it to the petitioner.

It is clear that recourse must be had to the powers conferred by the section which I have mentioned, if the wish of the petitioner is to be effected. The decision of Lord Ellenborough in *Clayton* v. *Earl Wilton* (2), as explained by Fry, J., in *Gale* v. *Gale* (7), shews that a conveyance by the petitioner to a purchaser for valuable consideration would not, even if the respondent were dead, confer a good title. Nor could the petitioner, as the law now stands, according to the decision of the Court of Appeal in *Paul* v. *Paul* (4), claim to set aside the settlement on the ground of the children of a second, or subsequent, marriage being volunteers. In the case of *Hastings* v. *Orde* (5),

(1) 3 Madd. 283.
(2) 3 Madd. 302, n.
(3) 6 Ch. D. 144.
(4) 20 Ch. D. 742.
(5) 11 Sim. 205.
(6) Ante, note, p. 92.
(7) 6 Ch. D. 144, at p. 150, where he cites the judgment of Cockburn, C.J., in *Clarke* v. *Wright* (6 H. & N. 849 at pp. 873, 874).

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in which, after a divorce by the House of Lords, Shadwell, V.C., held that the divorced wife was not bound by an ante-nuptial settlement made by her, the decision appears to have turned on the fact that the wife at the time of the marriage was an infant.

I am not aware of any case similar to the present in which the Court has been asked to deal with a settlement. There is undoubted power to deal with the capital of a settled fund for the benefit of a party to a dissolved marriage in such manner as the alteration of circumstances by the dissolution renders proper: *Ponsonby* v. *Ponsonby*. (1) At the same time, the Court will not disturb settlements further than the alteration of circumstances warrants, and will respect the interests of those whose conduct has not been impugned. The case of *Noel* v. *Noel* (2) is an illustration of the care exercised in carrying out these principles. But, in this case, the effect of the dissolution of the marriage has been, in the circumstances which have occurred, to render the rights of the children of a future marriage of the petitioner the sole limitation upon his absolute enjoyment of the property which he brought into settlement. Is it not, therefore, reasonable that the power of the Court should be exercised in the way the petitioner asks? I think that it is. There is no living person whose interests can be prejudiced, and the only persons who, if they come into existence, will be affected are children for whom the petitioner may naturally be expected to provide. As the main objects of the settlement have been frustrated by the divorce, I think it would be unfortunate that the petitioner should remain unable to deal with the property in question by way of resettlement, or otherwise, solely on account of provisions of the settlement which were never more than subordinate, and, of which the purpose has disappeared. It appears to me that this is a case in which the power conferred by the legislature may properly be exercised.

I think, therefore, that there should be an order upon the trustees to reconvey the property to the petitioner for his own use.

Solicitors: *Hargrove & Co.*

(1) 9 P. D. 122.

(2) 10 P. D. 179.

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1894
Nov. 30;
Dec. 18.

THE MECCA.

Admiralty—Jurisdiction—Necessaries—Foreign Ship — Foreign Port — High Seas—Action in rem—Admiralty Court Act, 1840 (3 & 4 *Vict. c.* 65), *s.* 6 —*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 5.

The plaintiffs supplied coals at Alexandria, Port Said, and Algiers to a steamship belonging to Jeddah in Asiatic Turkey, and also, at Port Said, advanced her canal dues.

To recover payment, the plaintiffs, on the arrival of the vessel in this country, commenced an action in rem for necessaries, and arrested her.

On motion by the owners of the vessel to set aside the writ for want of jurisdiction, Bruce, J., granted the application :—

Held, by the Court of Appeal (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), reversing the decision of Bruce, J., that, under the words of s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10), "any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs," the Court had jurisdiction.

The India (32 L. J. (Ad.) 185) overruled.

Semble, that in respect of the necessaries supplied at Alexandria and Algiers, the Court also had jurisdiction under s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), those places being "upon the high seas" within the meaning of that section.

Appeal, by plaintiffs, against an order of Bruce, J., setting aside, for want of jurisdiction, a writ in rem, in an action for necessaries, supplied to a foreign ship in foreign ports.

The plaintiffs were Cory Brothers & Company, Limited, coal merchants, carrying on business in London, at Alexandria, and at Port Said, and Antonio Legembre, their agent, a coal merchant, at Algiers.

In March, 1894, the first-named plaintiffs supplied coals at Alexandria and Port Said to, and at the latter place advanced the canal dues for, the steamship *Mecca*, registered under Turkish law at Jeddah in Asiatic Turkey, where her owners, the Hamadieh Steamship Company, carried on business. In August the second-named plaintiff supplied coals to the same steamship at Algiers. In respect of the coals supplied at Alexandria the master on March 6 drew a bill of exchange upon Constanti A. Theodoridi of Constantinople, who held a power of attorney from the owners

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of the *Mecca*, for 176*l.* 5*s.*, in favour of Cory Brothers, which bill was accepted, but not paid. In respect of the coals supplied at Port Said, and the canal dues advanced, the master on March 10 drew a bill on his owners for 194*l.* 8*s.* in favour of Cory Brothers, which was accepted, but not paid. In respect of the coals supplied at Algiers, the master, on August 28, drew a bill on his owners for 101*l.* 4*s.* 6*d.* in favour of Antonio Legembre; but this bill was not accepted. The three bills together amounted, with notarial charges and interest, to 483*l.* 1*s.* 2*d.*

According to an affidavit read by the plaintiffs, by leave of the Court of Appeal, it appeared that, at Alexandria, the coaling was done by lighters in the roadstead inside the breakwater. At Port Said the vessel, whilst coaling by lighters, lay in the Ismail Basin, directly in line with the entrance to the canal of which it is practically a part. There are no locks outside where the vessel lay, the level is the same as the sea level, and there is practically no tide. At Algiers the coaling was done by lighters in the roadstead inside the breakwater.

On October 4 the plaintiffs commenced an action in the Queen's Bench Division claiming 483*l.* 1*s.* 2*d.* against the master as the drawer of the three bills, and, on October 8, they commenced the Admiralty proceedings in rem, and arrested the vessel then lying in Mostyn Deeps, the writ claiming 800*l.* for necessaries and coals supplied to the Turkish steamship *Mecca*, and for Suez Canal dues, and the statement of claim set out the facts with regard to the supply of the coals and the giving of the bills by the master, and alleged that the coals were supplied and the advance made upon the credit of the steamship as well as upon the credit of her master.

On October 25 an order was made in the Queen's Bench Division that, on payment into Court of 400*l.*, the master should be at liberty to defend that action.

On November 5 the defendants, the owners of the *Mecca*, moved, in the Admiralty Division, to set aside the writ in rem on the ground that the Court had no jurisdiction, or, in the alternative, to stay proceedings pending the trial of the action in the Queen's Bench Division.

Bruce, J., in making an order setting aside the writ and all

subsequent proceedings with costs, said: "So long ago as the case of *The India* (1), Dr. Lushington certainly intimated an opinion that the statute of the 3 & 4 Vict. (2) did not apply to give this Court jurisdiction in a case where necessaries were furnished to a foreign ship at a foreign port, and, from that time to this, I am not aware that the authority of the dictum of Dr. Lushington, even if it were not more than a dictum, has ever been questioned, or that there has been any case during all the years, since that case was decided, where this Court has ever entertained a suit for necessaries furnished to a foreign ship in a foreign port.

With reference to the later statute, that of 1861 (3), it has been decided by a number of cases that that statute applies only to British and colonial ships.

I think I am bound by the decision of Dr. Lushington as to the statute of 1840, and I am also bound by a long series of decisions with reference to the statute of 1861.

Counsel for the plaintiffs said that, although from the affidavit to lead the warrant it appears that the necessaries were supplied at the ports of Port Said, Alexandria, and Algiers respectively, yet he thinks that possibly he might be able to adduce some evidence to shew that Port Said was not in territorial waters.

(1) 32 L. J. (Ad.) 185.

(2) The Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6: "And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made."

(3) The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5: "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales; provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court."

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A strong affidavit would be necessary in order to satisfy the Court that Port Said is on the high seas. But I do not think it would be a convenient course for the Court now to give leave to contradict the affidavit to lead the warrant.

I have very little doubt but that Port Said is within territorial waters; but if any question arises upon that point, and the case should go to the Court of Appeal, that Court, in its discretion, can allow affidavits to be filed to shew that Port Said is not in territorial waters."

On appeal,

Nov. 30. *Bucknill, Q.C.*, and *Gerard Ince*, for the appellants (plaintiffs). The appellants, Cory Brothers, English merchants having depôts, with agents and coal-hulks, at Alexandria and Port Said, and an agent, the other plaintiff, at Algiers, are entitled to prosecute their action in rem for necessaries supplied to the *Mecca* in those places which, in the view of the Court of Admiralty, are, it is submitted, on the high seas. In respect of Port Said particularly it is well known, and the plaintiffs' affidavit states, that that place only exists for the purposes of the canal—that is, for coaling and doing the other business of vessels passing through. It has been built out into the sea for this special purpose, and has no other trade, and affords no shelter in the sense of a port.

With regard to the contention that these places are on the "high" or "deep" or "main" seas, it will be remembered that by the first of the two statutes passed for restricting the Court of the Admiral to the high seas, viz., 13 Rich. 2, st. 1, c. 5, it was enacted "that the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." By the second statute, viz., 15 Rich. 2, c. 3, it was declared that "the Admirals' Court shall have no manner of cognizance, power, nor jurisdiction" in respect of "things rising within the bodies of the counties."

The result of prohibiting the Court of Admiralty from intermeddling with things done within the realm was that, as necessaries were seldom supplied upon the high seas, the jurisdiction

in Admiralty could rarely be exercised until the practice grew up of allowing material men to sue for payment out of the proceeds of ships sold in suits instituted by others. This jurisdiction, so exercised, was, however, practically destroyed by the decision of the Privy Council in 1835 in *The Neptune* (1), in respect of necessaries supplied in the port of London: see the observations of Dr. Lushington in 1864 in *The Pacific* (2), where the necessaries were supplied at Southampton.

In 1840, however, came the Act now in question (3 & 4 Vict. c. 65). That Act is headed, "An Act to . . . . extend the jurisdiction of the High Court of Admiralty," and the preamble states "that the jurisdiction of the High Court of Admiralty may be in certain respects advantageously extended." It then enacts, by s. 6, "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . . for necessaries supplied to any foreign ship . . . . and to enforce the payment thereof, whether such ship may have been within the body of a county, or upon the high seas, at the time when the . . . . necessaries (were) furnished . . . ." In this Act the legislature had in contemplation the same idea that is to be found in the statutes of Richard II., viz., the distinction between things done in the realm and on the high seas—that is, the distinction which gave rise to the long struggle to prevent the Admiralty Court taking cognizance of contracts made in this country relating to maritime matters, and dealing with them according to the civil law, so as to encroach upon the jurisdiction of the tribunals at Westminster and interfere with the institution of trial by jury. This was particularly shewn in the efforts of the Admiralty Court to get jurisdiction by feigning that contracts really made on land were made at sea, which was put down by prohibition, though it was only in imitation of the fictitious venue introduced at common law, by which "the conusance of contracts and other things done upon the sea 'was' made triable at the common law, by supposing the same to have been done in Cheapside": see Coke's Institutes, part iv. ch. xxii. p. 134. This distinction as to things done within and without the realm may be traced through the writings of Godolphin,

(1) 3 Knapp, P. C. C. 94. (2) Br. & L. 243.

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Browne, Selden, and others, and the object of the Act of 1840 was to give jurisdiction in Admiralty in the body of a county, and prevent the Court being prohibited; but the jurisdiction in respect of necessaries supplied to a foreign ship on the high seas which already existed was not interfered with, and it is erroneous to assume that the statute in any way excludes foreign ports, though that is the ground of the dictum of Dr. Lushington in *The India* (1); in other words, the Act of 1840 has two areas, one within the body of a county or "inter fauces terræ," and the other without the body of a county or on the high seas beyond the jurisdiction of a jury. The expression "high seas" means the water beyond low-water mark. In *General Iron Screw Co.* v. *Schurmanns* (2) Lord Hatherley said, "There can be no possible doubt that the water below low-water mark is part of the high seas." In *The Mali Ivo* (3) Sir Robert Phillimore said: "It is well known that the jurisdiction of the High Court of Admiralty extends to all cases of collision happening upon the seas—that is, within the ebb and flow of the tide." In *Reg.* v. *Anderson* (4) Blackburn, J., says: "Is the Garonne at the place in question to be considered the high seas? The term 'high seas' has had various meanings attached to it, but from the earliest times in this country the Maritime Court has had jurisdiction over what happens on the common ground of nations; and, further than this, from earliest times in England, and I think abroad also, it has been established that the jurisdiction of the Admiralty extends over vessels, not only when they are on the open sea, but also when in places where great ships do generally go"—that is, "at a place where the tide flows, and below all bridges." The principle now contended for was recognised by Dr. Lushington, for he held that, under s. 7 of the Act of 1861, in cases of damage by collision, the Court had jurisdiction between foreign ships in foreign waters: *The Courier* (5); and between British ships in foreign inland waters: *The Diana.* (6) Similar principles have been applied in the case of the salving

(1) 32 L. J. (Ad.) 185.
(2) 1 J. & H. 180.
(3) Law Rep. 2 A. & E. 356, at p. 358.
(4) Law Rep. 1 C. C. 161, at p. 169.
(5) Lush. 541.
(6) Lush. 539.

of property on the high seas, for, whatever the nationality of the salvors or of the property, the Court of Admiralty exercised the right of awarding salvage if the property was brought within the jurisdiction of the Court: see Lord Stowell's judgment in *The Two Friends* (1), though, above low-water mark, the Court did not acquire concurrent jurisdiction with the common law courts until given it by s. 31 of 1 & 2 Geo. 4, c. 75, and within the body of a county by s. 6 of the Act of 1840. Dr. Lushington's view in 1854 in *The Flecha* (2), that the main object for passing s. 6 of the Act of 1840 was to assimilate the law of England to "the general law of the maritime states of Europe," is disapproved by Lord Watson in *The Henrich Björn* (3); and in 1859, in *The West Friesland* (4), Dr. Lushington gave another reason for the passing of the Act. Dr. Lushington also took different views at different times as to the jurisdiction conferred by the Act of 1840. Cf. *The Ocean* (5), where, though the decision may perhaps be defended on other grounds, as the foreign ship was building in the foreign port, he held that s. 6 of the Act of 1840 was not intended to apply to ships in any part of the world; yet, in 1856, in *The Wataga* (6), he gave a very considerable extension to the Act by including a claim for necessaries supplied to an American ship at the Cape of Good Hope. There seems no good ground why his reasoning in that judgment should not cover the present case, as Alexandria, Port Said, and Algiers are not less on the high seas than that colonial port. That case was approved by the Court of Appeal in *The Anna* (7), where the question arose in respect of a Norwegian vessel at Quebec, and the demurrer to the jurisdiction was overruled. Again, the Act of 1840 applies only to foreign ships; but the Act of 1861 (24 Vict. c. 10) is for the purpose of extending the jurisdiction of the High Court of Admiralty, and by s. 5 the Court is given jurisdiction in the widest terms, for the words are "over any claim for necessaries supplied to any ship." The generality of these words is cut down by Dr. Lushington in *The*

(1) 1 C. Rob. 271.
(2) 1 Spinks, 438.
(3) 11 App. Cas. 270, at p. 279.
(4) Sw. 454.
(5) 2 Wm. Rob. 368.
(6) Sw. 165.
(7) 1 P. D. 253.

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India (1), though the Act only cuts them down where the ship is in the port to which she belongs, when it may be presumed that the persons supplying the necessaries are relying for payment on the personal credit of the owners. There is the further limitation, which does not affect this case, that at the time of the institution of the cause no owner or part-owner must be domiciled in England or Wales; but there is no ground for confining the application of the Act to British and colonial ships. It is submitted that Alexandria, Port Said, and Algiers are on the high seas, for the purposes of Admiralty jurisdiction, and therefore within the meaning of s. 6 of the Act of 1840; but if they are to be deemed to be foreign ports so that *The India* (1) applies, then it is submitted that that decision is wrong, because the section in question does not exclude such a port, and, in any event, the words of s. 5 of the Act of 1861 are sufficient to cover the case and give jurisdiction. It is important that the decision in *The India* (1) should be overruled, because the condition of things since that decision was given has changed, and ships are now built to travel at a great speed, and cannot carry coals enough to prosecute the whole voyage; so that coaling stations are being established by English coal merchants at convenient points on the lines of traffic by sea.

Pyke, Q.C., and *A. E. Nelson*, for the respondents (defendants). The vessel arrested being foreign, the question of jurisdiction turns on the meaning of s. 6 of the Admiralty Court Act, 1840, and as the necessaries were not supplied on the high seas, nor in the body of a county, but in a foreign port, the decision in *The India* (1) as to the meaning of the section is against the contention of the plaintiffs; nor can s. 5 of the Act of 1861 be relied on by the plaintiffs, because it applies only to British and colonial ships: *The Ella A. Clark.* (2) Both these decisions, so far as this point is concerned, have remained unchallenged for over thirty years, and could not now be overruled, as, in the words of James L.J. in *The Anna* (3), referring to a decision, then only twenty years old, of Dr. Lushington, which has been

(1) 32 L. J. (Ad.) 185.

(2) Br. & L. 32.

(3) 1 P. D. 253.

cited against the defendants, "It is too late now to raise questions of jurisdiction after that lapse of time."

If the jurisdiction, which is both in rem and in personam, is to have no limitation as to place or nationality, then a foreign ship can be seized, when she comes to this country, which has been supplied with necessaries by a foreigner, as is the case here in respect of the supply of coals at Algiers by the plaintiff Antonio Legembre; but such a state of the law was never contemplated, and would be highly inconvenient, for the right to arrest only arises if the vessel is in the same hands as when the necessaries were supplied; so that the Court would be involved in difficult questions of foreign law as to ownership.

[LORD HALSBURY. How did the words of s. 5 of the Act of 1861 get cut down so as to be held to apply to British and colonial ships only?]

The Act of 1861 was for the purpose of extending to English ships, of which the owners were not, at the time of the institution of the cause, domiciled in England, the Admiralty jurisdiction given by the Act of 1840 in the case of foreign ships supplied with necessaries within the body of a county. The state of things which the Act of 1840 was designed to remedy is explained by Dr. Lushington in *The Ocean* (1): see also *The Pacific* (2) and *The West Friesland.* (3) If the Act of 1861 is to be held to apply to foreign vessels, then the effect of s. 6 of the Act of 1840 is limited, though the Act of 1861 was intended to enlarge the jurisdiction given by the Act of 1840. The description of Port Said in the affidavit read on behalf of the plaintiffs, and an inspection of the chart, shew that the Ismail Basin, where coaling takes place, is an artificial structure, no doubt forming part of the canal, but cut out of the land so as to inclose a tract of water in the middle of land, and the waters are territorial and the place a foreign port. As to Alexandria and Algiers, they are natural harbours protected by breakwaters. Therefore, all three places will be covered by the definition of Sir Robert Phillimore in *Reg.* v. *Keyn* (4), where he says that "within this term 'territory' are certainly comprised the ports and harbours,

(1) 2 Wm. Rob. 368.
(2) Br. & L. 243, at p. 246.
(3) Sw. 454.
(4) 2 Ex. D. 63, at p. 71.

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and the space between the flux and reflux of tide or the land up to the furthest point at which the tide recedes."

As to the alternative part of the motion asking for a stay pending the action in the Queen's Bench Division——

[LORD HALSBURY. That point will still be open in the Court below.]

Bucknill, Q.C., in reply. In *The Wataga* (1) the decision was not come to by considering that the foreign ship in the colonial port was within the body of a county, but that she was, in the view of the Court of Admiralty, on the high seas, and therefore within the Act of 1840. In *Reg.* v. *Keyn* (2) Cockburn C.J. says, with reference to the criminal law: "Whatever of the sea lies within the body of a county is within the jurisdiction of the common law. Whatever does not, belonged formerly to that of the Admiralty, and now belongs to the Courts to which the jurisdiction of the Admiralty has been transferred by statute"; and he adds: "Such was the law in the time of Lord Coke, and, as regards offences, such it is still. As regards civil matters the jurisdiction of the Admiral has been extended to inland seas by statute 3 & 4 Vict. c. 65." In the *Ella A. Clark* (3) the Act of 1861 is said to be an enabling statute, so that there could be no intention of curtailing the effect of the Act of 1840. In *Reg.* v. *Carr and Wilson* (4) bonds were stolen from a British ship moored to the quay in the River Maas at Rotterdam, over sixteen miles from the sea. It was held that the larceny took place within the jurisdiction of the Admiralty of England, the vessel being afloat, below bridge, within the ebb and flow of the tide, and Lopes L.J. said: "The position of the ship was within the jurisdiction; she was on the high seas where great ships do go."

[The following were also referred to: *The Saxonia* (5); *The Franconia* (6); the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 476, reproduced by s. 565 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73).]

Cur. adv. vult.

(1) Sw. 165.
(2) 2 Ex. D. 63, at p. 168.
(3) Br. & L. 32.
(4) 10 Q. B. D. 76, at p. 86.
(5) Lush. 410.
(6) 2 C. P. D. 173.

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1894. Dec. 18. LORD HALSBURY. The question in this case arises, as to coal supplied in foreign ports to a ship now here, whether the Admiralty Division has jurisdiction to detain the ship for the price of the coals so supplied. Practically the question resolves itself into the question whether Dr. Lushington's decision in the case of *The India* (1) is to be followed in this Court. In the view I take of that question, I think it unnecessary to enter into the discussions which have arisen between the Common Law Courts and the Admiralty, and, indeed, I will assume that up to the year 1861 the Court of Admiralty would have had no jurisdiction in this case—though, as applicable to the supply at Alexandria and Algiers, I am by no means prepared to say that the high seas do not include those places of supply; but, as the Act of 1861 appears to me conclusively to dispose of the question, I would rather rest my judgment upon the language of that statute. Now, the 5th section of that statute provides that "the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs." Then follow qualifications which are immaterial in respect of this case, and which seem to me to give no materials for qualifying or cutting down the generality of the language I have quoted.

The learned judge who decided *The India* (1) held the words I have quoted to apply to a colonial ship in a foreign port, and I search in vain throughout the whole statute for anything which can justify the construction that you must imply the words British or colonial ship in the 5th section. The language of the 7th section, "any ship," is admitted to apply to any ship all over the world; and I am wholly unable to see why the same words employed in s. 5 ought not to receive an equally extended application. It cannot be alleged that the statute is only intended to apply to British ships, inasmuch as it is admitted that some of its provisions apply to all ships anywhere. Where the legislature intended to exclude foreign ships, and to apply its provisions solely to British ships, or ships in British waters, it has been careful to say so in terms: see ss. 8, 9 and 11; and upon ordinary principles of construction, where the legislature has

(1) 32 L. J. (Ad.) 185.

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enacted something in respect to any ship, and something else as to any British ship, it would be improper to assume there was no intentional distinction; neither is it possible to suggest any reasonable ground for the supposed limitation. Dr. Lushington himself, though he affirmed the limitation, seems himself to have been unable to suggest any reason for it. The Act itself professes to be an Act for the extending of the jurisdiction of the High Court of Admiralty, and the nature of the thing dealt with seems to me to point in the direction of extension rather than restriction.

I am therefore of opinion that the decision in the case of *The India* (1) was wrong.

The authority of Dr. Lushington treating of such a subject makes me hesitate to overrule a decision of his, particularly when it has remained unchallenged for so many years; but, on the other hand, the case turns upon the construction of a statute only thirty-three years old. Reluctant as one may be to disturb a decision acquiesced in so long, yet that decision involves principles of construction so serious that I think it is the duty of this Court to pronounce its disagreement with them. I am therefore of opinion that this appeal should be allowed, and that the respondents should pay the costs.

LINDLEY L.J. The question raised by this appeal is: whether a foreign steamship supplied with coal in foreign ports, but which ship was in this country when this action was commenced, can be proceeded against in the Admiralty Division of the High Court for the price of such coal.

Without investigating the early history of the Admiralty jurisdiction in civil cases, it is sufficient to start from the doctrine well settled in the time of Blackstone, namely:—1. That the Court of Admiralty had no jurisdiction to entertain any causes of action arising within the precincts or body of a county; 2. That the Court had jurisdiction over some causes of action arising on the high seas. (2) I say "some," because their number was limited to what are commonly called maritime causes. It must also be borne in mind that the Court of

(1) 32 L. J. (Ad.) 185.

(2) 3 Bl. Com. 106.

Admiralty had no jurisdiction over any causes of action arising in foreign countries beyond the seas, but not on the high seas. (1)

In 1840 an Act was passed to extend the jurisdiction in certain causes of action. (2) The causes of action enumerated in s. 6 are salvage, damage to ships, towage, and necessaries supplied to foreign ships. Necessaries supplied to English ships are not within the section, and the jurisdiction of the Court as to them was not extended. In fact it had none: see *The Two Ellens.* (3)

In *The Robert Pow* (4) Dr. Lushington said that the object of this enactment was to give the Court of Admiralty jurisdiction over certain causes of action, although they might arise within the body of a county; and in cases of damage he confined the jurisdiction to collisions between ships. There is no doubt that one of the main objects of the Act was to extend the jurisdiction as above stated. But this was not all; for, as pointed out in *The Henrich Björn* (5), the jurisdiction to entertain a suit for necessaries supplied to a foreign ship was conferred for the first time, and it was confined to them. The limited construction put by Dr. Lushington on the jurisdiction of the Court in cases of damage was not adopted by the House of Lords: see *The Zeta.* (6) The statute was held to apply to other cases of damage; and what is more important on the present occasion, the Act was held to define the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. The expression "high seas," when used with reference to the jurisdiction of the Court of Admiralty, included all oceans, seas, bays, channels, rivers, creeks, and waters below low-water mark, and where great ships could go, with the exception only of such parts of such oceans, &c., as were within the body of some county: see as to this, 28 Hen. 8, c. 15, 4 Inst. 134; Com. Dig. Admiralty, E. (1), (7), (14); *Reg.* v. *Anderson* (7); *Reg.* v. *Carr.* (8)

A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other part of the high seas. The jurisdiction,

(1) Com. Dig. Admiralty, F. 3.
(2) 3 & 4 Vict. c. 65.
(3) Law Rep. 4 P. C. 161, at. p. 166.
(4) Br. & L. 99.
(5) 10 P. D. 44.
(6) [1893] A. C. 468.
(7) Law Rep. 1 C. C. 161.
(8) 10 Q. B. D. 76.

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however, is necessarily limited in its application. It can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow, would not, I apprehend, be in any sense part of the high seas, whether such basin or dock were in this country or in any other. Apart then from authority, and on general principles of law, I should arrive at the conclusion that, in this case, the Court of Admiralty had, under the Act of 1840, jurisdiction to proceed against the *Mecca* when in this country for the coals supplied to her in Alexandria and Algiers, she being supplied on the high seas at those places, although they are also ports. But the basin at Port Said not being part of the high seas, the Court of Admiralty would have no jurisdiction under the Act of 1840 if it stood alone. The subsequent Act of 1861 (1) has again, however, extended the jurisdiction of the Court. This statute was passed expressly for that very purpose. Nothing can be wider than the language of ss. 4, 5, 6, 7, and 10. The expression used in them is "any ship"; and when this language is contrasted with the language used in ss. 8, 9, and 11, in which British ships are expressly mentioned, the inference is very strong that "any ship" means any ship, whether British, colonial, or foreign. Sects. 4, 5, 6, 7, and 10 do not refer to the high seas, and I see no justification for limiting the jurisdiction conferred on the Court by these sections to ships on the high seas. I read the sections as applying to any ships, anywhere; although, until they come to this country, they cannot be proceeded against here. Sect. 5, which deals with necessaries, runs thus: [The Lord Justice read the section, and continued:—] This section, it is true, is only applicable to some ships, namely, to those supplied elsewhere than in the ports to which they belong; but even then they are not to be proceeded against if any of their owners or part-owners are domiciled in England or Wales when proceedings in the Admiralty are instituted. This limitation, however, points not to the nationality of the ship, nor to any distinction between high seas and other places not on the high seas, but to the port of supply. The

(1) 24 Vict. c. 10.

exception includes English ships supplied at the ports to which they belong, but the larger class of ships from which the exception is taken is not confined to other English ships, but extends to all ships. If the ship, whether English, colonial, or foreign, is supplied with necessaries in her own port, the probability is that there are persons there to whom credit is given and who can be sued there. But if, as in the present case, the ship is supplied in some other place, the supplier of necessaries (if he does not obtain cash on delivery, which may be impossible) is very likely never to get paid at all. There is good reason, therefore, both in the interest of the supplier and in the interest of the shipowner, for giving the supplier a remedy against the ship if she comes to this country. If there were no such remedy supplies would often be refused, however urgently required.

Apart, then, from authority, I am of opinion that, under this statute of 1861, the Court would have jurisdiction to entertain this action for the coals supplied to the *Mecca* in the basin at Port Said, as well as for those supplied in the ports of Alexandria and Algiers. Even if these two ports are not parts of the high seas, as I think they are, still the Act of 1861 goes further than the Act of 1840, and is wide enough to give the Court jurisdiction to arrest the ship for the price of the coals supplied at all three places. I turn now to the authorities, and I find that in 1863, in *The India* (1), Dr. Lushington held that, even under the Act of 1861, the Court of Admiralty had no jurisdiction to entertain a suit for necessaries supplied to a foreign ship in a foreign port. The same learned judge had expressed an opinion to the same effect in *The Ocean* (2), decided in 1845. Dr. Lushington, however, decided in 1856 that the Court had jurisdiction under the Act of 1840 to entertain a suit for necessaries supplied to a foreign ship in a colonial port: *The Wataga* (3); and this case was approved and followed by this Court in *The Anna.* (4) The same point had been decided in the same way in 1854 as regards necessaries supplied to a foreign

(1) 32 L. J. (Ad.) 185.
(2) 2 Wm. Rob. 368.
(3) Sw. 165.
(4) 1 P. D. 253.

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ship in the Thames: *The Flecha.* (1) Sect. 6 of the Act of 1840, and sect. 5 of the Act of 1861, and these decisions shew that it is not the nationality of the ship which is important, but the place of supply. Unless, however, the place of supply is the port to which the ship belongs, the place of supply is not made material. But the authority of Dr. Lushington on all Admiralty matters is deservedly so high, that I should hesitate long in differing from him on the construction of the statutes in question if the House of Lords had not held that he construed the Acts of 1840 and 1861 erroneously in other cases. It was, however, so held in *The Zeta* (2), in the *The Sara* (3), and in *The Henrich Björn.* (4) These decisions, it is true, do not overrule *The India* (5); they relate to other matters—namely, damage and lien for necessaries—but they shew that the construction put on the statutes of 1840 and 1861 by Dr. Lushington was in some respects incorrect. Guided by these decisions, and applying my own mind to the statutes in question, I have arrived at the conclusion that the decision in *The India* (5) was erroneous and ought no longer to be followed.

The appeal, therefore, must be allowed, with costs here and below.

A. L. SMITH L.J. The point raised in this case is whether the High Court of Admiralty in England, either under the Act of 1840 (3 & 4 Vict. c. 65) or under the Act of 1861 (24 Vict. c. 10), has jurisdiction to entertain a claim for necessaries supplied to a foreign ship in a foreign port, the ship having subsequently come to this country, where proceedings in rem in the Admiralty Division of the High Court were thereupon taken.

It is not disputed that, if the Admiralty Court has jurisdiction, proceedings in rem can be had: see s. 35 of the Act of 1861. Bruce J. followed, as he was bound to do, the decision of Dr. Lushington in the case of *The India* (5), in which that learned judge held that the Court of Admiralty had no jurisdic-

(1) 1 Spinks, 438.
(2) [1893] A. C. 468.
(3) 14 App. Cas. 209.
(4) 11 App. Cas. 270.
(5) 32 L. J. (Ad.) 185.

tion if the necessaries were supplied to a foreign ship in a foreign port.

The present appeal is in reality brought to review the construction Dr. Lushington has placed upon the statute of 1861, firstly, in the case of *The Ella A. Clark* (1), decided February 14, 1863, and then in the case of *The India* (2), decided March 26, 1863. It cannot be denied that judgments so long sanctioned by acquiescence are of great weight, and ought not, without good reason, to be disturbed upon the principle that communis error facit jus; and James L.J. went so far in the case of *The Anna* (3) as to say, "It is too late to raise questions of jurisdiction after that lapse of time"—in that case twenty years. This, however, is the first time in which the construction of these statutes upon the present point has been brought up for consideration in a Court of Appeal; and, in my judgment, it is incumbent upon this Court, irrespective of judgments in courts of first instance, to apply itself to the construction of statutes of the present reign and ascertain what they enact, and then look to the judgments, which, if not clearly incorrect, ought to be upheld. The Lord Chancellor (Lord Halsbury), in *The Sara* (4), in the House of Lords, pointed out what was the duty of a Court when construing a comparatively modern statute, and not business documents, even though a prior decision thereon had been practically adopted in actual business; and the House in that case, notwithstanding prior decisions which had been acted upon, placed what it considered to be the true construction upon the Act of 1840 as to the point then raised. The facts are these: The plaintiffs Messrs. Cory Brothers, who are large coal merchants in London, supplied to the Turkish SS. *Mecca*, at Port Said, Alexandria, and Algiers, out of their coal depôts there, coal and other necessaries which were required for the due prosecution by the steamship of her voyage. The steamship subsequently came to this country; and the plaintiffs thereupon took proceedings in rem against the ship in the Admiralty Division of the High Court, and the question is, Has the Court of Admiralty jurisdiction to entertain this proceeding?

(1) Br. & L. 32.
(2) 32 L. J. (Ad.) 185.
(3) 1 P. D. 253, at p. 259.
(4) 14 App. Cas. 209, at p. 216.

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I will deal with this case as if the supply of coal had all taken place at the Ismail Basin at Port Said, for, whatever be the correct view of what constitutes the "high seas" in s. 6 of the Act of 1840, when applied to Alexandria and Algiers, the supply of necessaries at the Ismail Basin at Port Said was clearly not a supply upon the high seas, but, on the contrary, was a supply in a foreign port; and this raises the real point the parties desire to have determined. By s. 6 of the Act of 1840 jurisdiction is given to the High Court of Admiralty to decide all claims and demands, amongst others, for necessaries supplied to any foreign ship, whether such ship, when the necessaries were supplied, was within the body of a county or upon the high seas. The construction of this section was fully discussed in this Court in the case of *The Henrich Björn.* (1)

It was argued by counsel for the appellants (the plaintiffs) that this section gave the High Court of Admiralty jurisdiction over claims for necessaries supplied to a foreign ship in a foreign port. I cannot so read it. If a foreign ship is in the body of a county (which, apart from authority, I should have thought meant a county in the United Kingdom), or upon the high seas, when the necessaries are supplied, then the Court of Admiralty has jurisdiction over a foreign ship; but I can find no jurisdiction given by this section, if the foreign ship be in a foreign port, which is not part of the high seas, and I adopt Dr. Lushington's words in *The India* (2): "I think it impossible to maintain that the words 'in the body of a county, or upon the high seas,' involve necessaries furnished in a foreign port; nor do I see any expression from which I could infer that a foreign port was included." I understand the learned judge to be here dealing with a port which is distinct from the high seas. After the year 1840 and before the passing of the Act of 1861, namely, in 1856, Dr. Lushington held, in the case of *The Wataga* (3), that the 6th section of the Act of 1840 conferred jurisdiction upon the High Court of Admiralty over a claim for necessaries supplied to a foreign vessel in a colonial port, and whether this was correct was not allowed to be argued in this Court in *The*

(1) 10 P. D. 44, at p. 51. (2) 32 L. J. (Ad.) 185, at p. 187.
(3) Sw. 165.

Anna (1) upon the ground above mentioned. In the year 1861 the Admiralty Court Act of that year (2), which is an Act to extend the jurisdiction of the High Court of Admiralty, was passed. The question is whether s. 5 of this Act, which deals with a claim for necessaries, applies solely to British ships or to both British and foreign ships; for if it does, it is clear to me that it applies to a claim for necessaries supplied to a foreign ship in a foreign port, for the sole limitation to the jurisdiction conferred by the section as to place of supply is when the necessaries are supplied "in the port to which the ship belongs."

The initial words of s. 5 are, "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship": the largest possible words, wholly irrespective of whether the supplies take place in the body of a county, or in a colonial port, or in any other place, the sole exception being that they must not be supplied at the port to which the ship belongs. It is impossible, I think, to say that ss. 4, 6, 7, 10, and 13 of the Act of 1861 are not applicable to foreign as well as British ships; take, for instance, s. 6, which, in some respects, is very similar to s. 5, upon which this case hinges. In each of these two sections "any ship" is the phrase used, and in each there is the exception from the jurisdiction therein conferred, if it "is shewn to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part-owner of the ship is domiciled in England or Wales." That jurisdiction is given by s. 6 to the High Court of Admiralty over any claim by an owner or consignee of any bill of lading for damage to cargo carried in any ship, that is, whether British or foreign, in any port of England or Wales—except in the case of any owner or part-owner of the ship being domiciled in England or Wales at the time of the institution of the cause—is clear. That the other sections, namely, 4, 7, 10, and 13, apply to both British and foreign ships appears also clear. That these five sections (4, 6, 7, 10, and 13) apply to any ship, whether British or foreign, is made still more clear, if possible, when ss. 8, 9, and 11 are looked at, for in these sections the subject-matters therein dealt with are expressly confined either to "any ship registered

(1) 1 P. D. 253. (2) 24 Vict. c. 10.

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at any port in England or Wales," or to "any British ship." This being so, what is there to lead to the conclusion that s. 5—in which the words used are "any ship," as in ss. 4, 6, 7, 10, and 13, and without any limitation as to their being British ships, as in ss. 8, 9, and 11—is to be held to be confined to British ships, and not to include both British and foreign ships, which clearly are embraced in the term "any ship"? It is said that the two exceptions, the one having reference to there being an "owner or part-owner domiciled in England or Wales," and the other when the supplies are furnished at the home port of the ship, have this effect. The reason for the exception from the jurisdiction, conferred by ss. 5 and 6, where there is an owner or part owner domiciled in England or Wales at the institution of the cause, is that if there be an owner or part-owner of the ship then "domiciled in England or Wales" there is no necessity to confer jurisdiction upon the Court of Admiralty, inasmuch as the claimant, whether for necessaries supplied or for damage to cargo, has a person he can sue in the ordinary Courts of this country, whereas, if there be no such owner or part-owner in England or Wales, the claimant may well require the aid of the Court of Admiralty in rem, if the ship afterwards came here, in order to obtain satisfaction of his claim. I cannot think that the insertion of this exception, which is in ss. 5 and 6 alike, is such as to confine the jurisdiction given by these sections to British ships, though Dr. Lushington, in the case of *The Ella A. Clark* (1), said, "The words 'owner or part-owner domiciled in England or Wales' appear to me to refer manifestly to ships not foreign-owned when the debt was contracted"; and in *The India* (2) he says: "I think that this proviso points to the owners of British and colonial ships; and having regard to the improbability of the British parliament legislating for the transactions of foreigners in foreign ports, I must hold that the claimant for necessaries cannot maintain his case under the 5th section of this statute." I agree that in the case of a British ship, and it may be of colonial ships, this exception is far more likely to come into play than in the case of a foreign ship; but further than this I cannot go. Moreover, Dr. Lushington,

(1) Br. & L. 32, at p. 37. (2) 32 L. J. (Ad.) 185, at p. 187.

in *The St. Cloud* (1), expressly stated that s. 6 applied to short delivery of goods brought to this country in *foreign* ships, and gave, as the reason for that section becoming law, that the aggrieved party might arrest the ship; and it would seem that Dr. Lushington, when he gave this judgment, did not consider that this exception was such as to render s. 6 only applicable to British ships, for he expressly stated that it applied to foreign ships—and in this I agree. Then why does not s. 5 in like manner apply to both foreign and British ships? It is said because of the additional exception contained in s. 5, which is, "that the necessaries should have been supplied to any ship elsewhere than in the port to which the ship belongs." I agree that this principally refers to British ships; but why does it necessarily exclude foreign ships? I would point out that, if the reason for conferring extended jurisdiction upon the High Court of Admiralty by the Act of 1861 is to give "a remedy in rem for a just claim where no personal action can be brought," which Dr. Lushington in *The Ella A. Clark* (2) says is the spirit of the Act, I cannot see what good sense there is for excepting foreign ships in respect of the supply of necessaries from s. 5, unless the section plainly enacts that they are excepted. In my judgment, s. 5, as also s. 6, apply both to foreign and British ships. Dr. Lushington in March, 1864, in the case of *The Pacific* (3), again gave his view of s. 5 of the Act of 1861, which I fully adopt and agree with. He said, "This state of things was altered by the 3 & 4 Vict. c. 65, s. 6, which gave the Court jurisdiction over claims for necessaries supplied to a foreign ship; but that statute not applying to British ships, the 24 Vict. c. 10, s. 5, gave jurisdiction over claims for necessaries supplied to *any* ship, subject to two provisoes—that the supply should have been made elsewhere than in the port to which the ship belongs, and that, at the date of the institution of the suit, the shipowner should not be domiciled in this country. These enactments may seem diverse, but the reason for this is plain and uniform. *Against the foreign vessel a real action is given* to the material man in all cases, because the owner is assumed *to be*

(1) Br. & L. 4, at p. 14. (2) Br. & L. 32, at p. 37.
(3) Br. & L. 243, at pp. 245, 246.

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beyond the jurisdiction, and it is also denied against a British vessel, in case the necessaries have been supplied in the home port, because the presumption is that the supply was made upon the personal credit of the owner, who would there be known and trusted."

This judgment was given a year after those in *The Ella A. Clark* (1) and *The India* (2), upon which the respondents rely, and would seem to be inconsistent with them; for, if s. 5 of the Act of 1861 applies to foreign ships, why does it not apply to the supply of necessaries to a foreign ship in a foreign port? No answer was given to this. I cannot read s. 5 of this Act of 1861 as conferring jurisdiction only in cases of British ships.

If it had been intended by the legislature to limit the jurisdiction of the Court of Admiralty to British ships, nothing would have been easier than to have used the words which were used in ss. 8, 9, and 11, when it was intended to confer jurisdiction only in cases of British ships; and, in the absence of these words, and reading the Act as a whole, my clear conclusion is that by s. 5 of the Act of 1861 the Admiralty Court has jurisdiction over a foreign ship, and consequently for necessaries supplied to such ship amongst other places in a foreign port, when such ship comes within the jurisdiction of the Court.

The reasons given by Dr. Lushington in the cases of *The Ella A. Clark* (1) and *The India* (2) for holding that he had no jurisdiction over a foreign ship, if the necessaries were supplied in a foreign port, are, in my judgment, untenable; and I, therefore, do not think that he has placed the true construction in *The India* (2) upon the statute of 1861, and that this appeal must be allowed.

Appeal allowed.

Solicitors for appellants (plaintiffs): *Ince, Colt, & Ince.*

Solicitors for respondents (the owners of the *Mecca*): *Lowless & Co.*

(1) Br. & L. 32.

(2) 32 L. J. (Ad.) 185.

T. L. M.

THE PILGRIM.

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Jan. 14, 16.

Admiralty—Limitation of Liability—Sailing Ship—Registered Tonnage—Navigation Spaces—The Merchant Shipping Acts Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*The Merchant Shipping* (*Tonnage*) *Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 3, *sub-s.* 1, (*a*), (*b*), (*i.*), (*ii.*)—*The Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 79, 503.

In an action for limitation of liability:—

Held, by Bruce, J., that the owner of a *sailing* ship, in calculating the registered tonnage upon which his statutory liability in damages under s. 54 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63) is based, can deduct the navigation spaces mentioned in s. 3, sub-s. 1 (*a*), (*b*), (i.), (ii.), of the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43).

The Umbilo ([1891] P. 118) distinguished.

ACTION for limitation of liability on behalf of the owner of the registered British sailing ship *Pilgrim*.

The facts, so far as material on the question of the deduction of navigation spaces, in calculating the registered tonnage of the vessel, were as follows:—

On August 11, 1894, a collision occurred in the English Channel between the plaintiff's schooner *Pilgrim*, from Portmadoc to Stettin with a cargo of slates, and the Norwegian barque *Brœkka*, in consequence of which the *Pilgrim* sank, and her master and three of her crew were drowned.

On September 19 the defendants, the owners of the *Brœkka*, commenced an action in personam for the recovery of damages occasioned by the collision; and on October 9 the owners of cargo laden on board the *Pilgrim* commenced another action.

The owner of the *Pilgrim* admitted that, without his actual fault or privity, the collision was caused by the improper navigation of his vessel, and, as plaintiff in the present action—brought November 15, 1894 (1), against the owners of the *Brœkka*, the owners of the cargo lost in the *Pilgrim*, and all other persons claiming damages in respect of the collision—sought for a stay of all proceedings (subject to security being given in respect of

(1) The Merchant Shipping Act, 1894, consolidating the enactments relating to merchant shipping, did not come into operation until January 1, 1895, and this case was, therefore, decided on the earlier repealed statutes.

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any claim for loss of life or personal injury) upon payment into Court, with interest from the date of the collision, of the sum of £1101 17*s.*, being £8 per ton, calculated under s. 54 of the Merchant Shipping Acts Amendment Act, 1862 (1), on a registered tonnage of 137·73 tons.

The copy of the register, as verified by affidavit, shewed that the figure 137·73 was arrived at by deducting from 158·72 tons, being the gross tonnage, the following, allowed by Board of Trade surveyor's certificate dated February 25, 1891, namely: Forecastle, 8·18 tons; and, under the Merchant Shipping (Tonnage) Act, 1889 (2), 12·81 tons, made up of: master's room 2·50 tons, chart-room 3·47 tons, sail-room 3·42 tons, and boatswain's store 3·42 tons.

At the hearing, the deduction of 12·81 tons navigation space was objected to by the defendants on the ground that that allowance has reference to the payment of dues, and is not for the purpose of limiting the statutory liability of the owner in damages. The defendants also relied upon *The Umbilo* (3), where Sir James Hannen refused to allow this deduction when computing the gross tonnage of a steamship for the purpose of ascertaining the owner's liability in damages.

Arthur Pritchard, for the plaintiff, the owner of the *Pilgrim*.

Butler Aspinall, for the defendants, the owners of the *Brœkka*.

Stubbs, for the defendants, the owners of the cargo in the *Pilgrim*.

(1) 25 & 26 Vict. c. 63, s. 54: "The owners of any ship . . . shall not . . . be answerable in damages . . . in respect of loss or damage to ships, goods, merchandize, or other things . . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships, the gross tonnage without deduction on account of engine-room."

(2) 52 & 53 Vict. c. 43, s. 3, sub-s. 1: "In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage: (*a*) In the case of a ship wholly propelled by sails, any space set apart and used exclusively for the storage of sails: (*b*) In the case of any ship—(i.) Any space used exclusively for the accommodation of the master: (ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals and other instruments of navigation and boatswain's stores."

(3) [1891] P. 118.

The arguments of counsel sufficiently appear from the judgment. In addition to the case and statutes there mentioned the following were referred to: *The Petrel* (1); Abbott's Law of Merchant Ships, 13th ed. p. 1100, note (*d*) to 25 & 26 Vict. c. 63, s. 54, and p. 1217, note (*a*) to 52 & 53 Vict. c. 43, s. 3, sub-s. 1 (*b*).

Cur. adv. vult.

Jan. 16. BRUCE J. The question in this case is whether the deductions, which, by the 3rd section of the Merchant Shipping (Tonnage) Act, 1889, were, for the first time, authorized to be made in calculating the registered tonnage of ships, are to be taken into consideration in determining the amount of damages in respect of which the owner of a sailing ship can be made responsible in a case where the circumstances entitle him to have his liability limited. The 54th section of the Act of 1862, which, at the time of the commencement of the action, regulated the rights of the parties as to limitation of liability, expressly states that the tonnage in respect of which the liability is to be regulated shall be the *registered* tonnage in the case of sailing ships. The Act of 1889, upon the construction of which this question turns, is to be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same: see s. 7 of the Act of 1889; and it seems to me impossible to arrive at any other conclusion than this, that the deductions, which, by the Act of 1889, are directed to be made for the purpose of ascertaining the registered tonnage, must be taken into consideration for the purpose of ascertaining the measure of the limitation of liability. It would give rise to the most serious inconvenience to hold that there should be two measures for ascertaining the registered tonnage of a ship—that one measure should be adopted for the purpose of ascertaining the limit of liability, and another measure for other purposes. Such an anomaly never could have been intended, and I think it would be doing great violence to the words of the statutes to hold that they were capable of any such interpretation.

The only difficulty I have felt in this case arises from the decision of Sir James Hannen in the case of *The Umbilo*. (2)

(1) [1893] P. 320. (2) [1891] P. 118.

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That case is, of course, binding upon me, and if I thought it was applicable to the present case, I should, whether I agreed with the decision or not, be bound to follow it. But it appears to me that that decision has no application to the point raised in the present case. *The Umbilo* (1) was expressly decided upon the meaning of the words "gross tonnage" as applied to steamships, and, I think, in the present case, in holding that the plaintiff, the owner of a sailing ship, is entitled to the deductions he seeks to make for the purpose of reducing his liability, I am not deciding anything at variance with that decision.

I have only to observe that the language used in the Merchant Shipping Act, 1894, ss. 79 and 503, sub-s. 2 (2), seems to point to the conclusion that the legislature has itself adopted a construction of the earlier Acts which is in accordance with the view I have expressed.

I determine that the plaintiff is entitled to limit his liability, and that the amount of his liability is to be calculated upon the registered tonnage as stated in the statement of claim.

Solicitors for plaintiff, the owner of the *Pilgrim*: *Pritchard & Sons.*

Solicitors for defendants, the owners of the *Brœkka*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of cargo in the *Pilgrim*: *Stokes, Saunders, & Stokes.*

(1) [1891] P. 118.

(2) 57 & 58 Vict. c. 60, s. 79, sub-s. 1:—

"In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage, namely: (*a*) In the case of any ship—(i.) Any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto. (ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation and boatswain's stores. . . . (*b*) In the case of a ship wholly propelled by sails, any space set apart and used exclusively for the storage of sails."

Sect. 503, sub-s. 2 (*a*): "The tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room; and the tonnage of a sailing ship shall be her registered tonnage."

T. L. M.

THE NAUTIK.

1895
Jan. 14, 16.

Admiralty—Jurisdiction—Damage to Cargo—Action in Rem—Writ Served, but Warrant not Served—Judgment by Default.

A writ in rem was duly served, within the jurisdiction, by nailing it to the mast of a foreign vessel proceeded against for damage to cargo, and a warrant for her arrest was issued, but, before it could be served, the master clandestinely put to sea.

On motion for judgment by default:—

Held, by Bruce J., that the Court had jurisdiction to pronounce judgment, for, though, according to the ordinary practice, the property proceeded against must be under the arrest of the Court, still the service of the writ by which actions in rem are now commenced is notice to all persons interested in the property of the claim indorsed on the writ, and has the same effect, so far as notice is concerned, as the service of the warrant under the former practice.

MOTION for judgment by default. The plaintiffs were Knowles & Foster, consignees, and holders of the bill of lading of a cargo of cotton seed by the Norwegian barque *Nautik*, of which vessel the defendants were the owners.

On the arrival of the *Nautik* at Liverpool from Pernambuco her cargo was found to be damaged, and on August 10, 1894, the plaintiffs' agents in Liverpool, who had paid the balance of freight, and had taken delivery of the cargo, gave the agents of the vessel notice that she would be arrested unless bail was given. The next day the solicitors acting for the agents of an indemnity insurance club in Norway gave their clients' undertaking that the vessel should not leave Liverpool before the 15th, and on that day undertook that the vessel should not leave Liverpool until the plaintiffs had had twenty-four hours' notice.

On the same day the plaintiffs issued a writ of summons in rem out of the Liverpool District Registry in the usual form, addressed to the owners and parties interested in the barque *Nautik*, of the port of Egersund, Norway, and on August 17 the writ was duly served by nailing the original on the mainmast of the vessel, then lying in the Prince's Dock, Liverpool, and, on taking off the process, leaving a true copy nailed in its place, indorsed with a claim for damage to the plaintiffs' cargo.

On August 18 the vessel left the dock in tow of a tug and

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went into the river ostensibly to proceed to Garston, to load a cargo outwards under charter.

The solicitors in Liverpool acting for the agents of the insurance club, finding that there was a difficulty in communicating with the owners of the vessel in Norway, wrote on August 20 to the plaintiffs' solicitors in Liverpool withdrawing the undertaking, and the plaintiffs thereupon issued a warrant for the arrest of the vessel, but this could not be served, as it was found that the master of the vessel, instead of going to Garston to load, had anchored in the river, and then employed another tug on the night of the 18th to tow his vessel out to sea.

Aspinall, Q.C., in support of the motion. The usual practice is to set down the action for trial by default in the prescribed time after service of the warrant; but as the citation of the parties interested, which was formerly embodied in the warrant (1) and which was the important part, so far as notice is concerned, of the old procedure by warrant, as well as of the equivalent earlier procedure by mandate (2), is now contained in the writ of summons, it is submitted that the service of the writ was notice to the master and all concerned of the nature of the claim made against this vessel.

In *The Parlement Belge* (3) Brett L.J., delivering the judgment of the Court, said, with reference to the process in rem: "We cannot allow it to be supposed that, in our opinion, the owner of the property is not indirectly impleaded. . . . The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him."

No doubt the note on procedure in Williams and Bruce's Admiralty Practice, 2nd ed., p. 243, is correct, that, in spite of

(1) For form of warrant, see Coote's Admiralty Practice, p. 214, No. 5.

(2) For forms of mandates of the Admiral to the Marshal of the Court, and to the Searcher of the River Thames, together with the return of the Marshal and of the Searcher, probably collected for the use of Sir Thomas Beaufort, Lord High Admiral, in the time of Henry V., see pp. 348, 350, 362, 364, vol. i. of the Black Book of the Admiralty edited by Sir Travers Twiss, 1871.

(3) 5 P. D. 197.

the word "may," in Order v., rule 16, of the Rules of the Supreme Court, the plaintiff *must*, in order to obtain the security of the res, take out a warrant of arrest, otherwise the Court will not, under ordinary circumstances, pronounce judgment by default; but as the present writ of summons in an Admiralty action in rem under Order II., rule 7, of the Rules of the Supreme Court, is a citation, for it is directed to the owners and parties interested in the vessel, commanding them to cause an appearance to be entered, and, without referring to the warrant, gives notice that in default judgment may be given in their absence, the result is that, under the existing practice, the warrant (1) is relegated to its proper function—that of enabling the property to be seized by the Court by way of security to answer the claim indorsed on the writ, and, therefore, it is submitted that when, as here, the master of the vessel has evaded the service of the warrant, the Court will not—now that a statement of claim for 615*l.* 18*s.* 2*d.* has been filed in lieu of service, notice of trial given, and the proper period before the hearing has elapsed—allow the plaintiffs to be defeated in obtaining judgment in default of appearance in respect of a claim of which the owners of the vessel have had due notice by the service of the writ. In the case of *The Lady Blessington* (2) the master of the ship, in contempt of the warrant, sailed out of the jurisdiction. Dr. Lushington allowed the cause to be set down for hearing, and subsequently condemned the ship in the claim for necessaries.

Cur. adv. vult.

Jan. 16. BRUCE J. In this case the plaintiffs seek to obtain judgment by default against the *Nautik*, a Norwegian vessel, in an action for damage to cargo. A writ in rem in the ordinary form was served on August 17 on the vessel while she was lying in the Prince's Dock, Liverpool.

After the service of the writ, and before the barque was arrested, the master of the barque clandestinely sailed at night from the port of Liverpool, and the barque has not since been within the jurisdiction.

(1) For form of warrant, see Rules of Supreme Court, 1883, App. A., Part I., No. 17.

(2) 34 L. J. (Ad.) 73.

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Bruce J.

The usual time having elapsed since the date of the service of the writ to entitle the plaintiffs to have the case heard, the question arises whether, the property not having been under the arrest of the Court, the Court has jurisdiction to pronounce judgment by default.

I am of opinion that it has. Service of a writ in rem, upon property within the jurisdiction of the Court, is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit in rem was commonly commenced by a warrant arresting the property, just as, in still earlier practice, a suit in personam was commonly commenced by a warrant arresting the person. But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a court of competent jurisdiction, and that, if they do not appear to vindicate their rights, judgment may be given in their absence.

The Rules of the Supreme Court directed that actions in rem should be commenced by writ, and I think the service of the writ on the property has the same effect, so far as notice to the persons interested in the property is concerned, as service of a warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject-matter of a suit, should be actually in the possession of the Court or under the arrest of the Court; it is enough that it should, according to the words of Lord Chelmsford, in the case of *Castrique* v. *Imrie* (1), "be within the lawful control of the State under the authority of which the Court sits."

The same view is expressed by Jessel M.R. in *The City of Mecca*. (2) That learned judge says: "An action for enforcing a maritime lien may, no doubt, be commenced without an actual arrest of the ship."

I therefore give judgment for the plaintiffs' claim with costs.

Solicitor for plaintiffs: *John R. Watkins, Liverpool.*

(1) Law Rep. 4 H. L. 414, at p. 448. (2) 6 P. D. 106, at p. 112.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1895
Feb. 1.

THE BONA.

Admiralty — Insurance (Marine) — General Average — Stranded Steamer — Engines, Damage to — Cost of Coal for Working Engines.

If in endeavouring to refloat a steamship stranded in a position of peril, the engines are intentionally worked, at the risk of damage, for the common safety, the damage so caused to the engines is a general average loss, and the value of the coal consumed in working the engines is also the subject of general average contribution.

APPEAL by defendants, the Indemnity Mutual Marine Assurance Company, Limited, in an action on a marine policy of insurance, against a decision of the President (Sir F. H. Jeune) in favour of a claim of the plaintiffs, the English and American Shipping Company, Limited, the owners of the steamship *Bona*, to be indemnified in respect of the ship's contribution in general average.

The question was whether the defendants were liable to contribute, pro ratâ, in general average in respect of fifty-two tons of coals, of the agreed value of $390, consumed in working the engines during the time they were being used in the attempt to get, and in getting, the *Bona* off the ground, under the following circumstances:—

On January 11, 1893, about 1 P.M., the *Bona*, in the course of a voyage from Galveston for Liverpool, viâ Norfolk, Virginia, with a cargo of cotton and flour in bags, took the ground without negligence on the part of those in charge of her, while crossing Galveston Bar, and was in a position of considerable danger.

Efforts were made by working the engines to get her off; but she remained fast, thumping and straining heavily. At 3.30 P.M., there being no other tug, the master arranged with the pilot tug to assist the vessel, and the tug carried out a stream anchor and dropped it in 19 fathoms; but when the hawser was hove taut the tide had fallen and the vessel would not move. At 5 P.M. there was 13 ft. 9 in. of water on the starboard side, and 13 ft. on the port side, the vessel drawing 14 ft. 3 in. fore and aft. From 8 P.M. to midnight the engines were kept ready for immediate

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use. On the morning of the 12th the vessel lay more quietly. At 6 A.M. 11 ft. of water was found on the starboard side, and 10 ft. on the port side. At 1 P.M., owing to the bad appearance of the weather and the exposed position of the vessel, the master commenced to lighten her, and by the morning of the 13th 918 bales had been discharged into lighters. At 4.35 P.M. the engines were worked ahead and astern, but she did not move. By 10 P.M., the wind and sea having increased, the vessel struck the ground heavily, and by 1.30 A.M., when the weather was at its worst, seas washed over the vessel's deck. The engines were worked full speed ahead and astern from this time until 4.30 A.M. on the 14th with no result, though they were put to unusual strain, and sustained a considerable amount of damage. At 10.30 A.M. the vessel became unsteady, and the engines were started; but she remained fast, and by noon her main deck worked and undulated. At 1 P.M., the engines still working at full speed, she came off the bank into deeper water, and steamed into 5½ fathoms, where she was brought to anchor, the vessel's draft being 13 ft. 6 in. fore and aft. After being surveyed in Bolmer Roads, Galveston, she proceeded to Norfolk, where necessary repairs were done to the boilers, and from thence she proceeded to Liverpool with her cargo, where repairs to the hull, rendered necessary by the stranding, were effected at a cost of 2878*l.* 8*s.* 3*d.* The like repairs to the engines and machinery cost 356*l.* 11*s.* 2*d.*, the latter sum being apportioned as follows: general average, 273*l.* 16*s.* 4*d.*; ship, 82*l.* 14*s.* 10*d.* The defendants paid their proportions of these several amounts in particular and general average; but, whilst admitting that the engines were properly employed, the defendants declined to contribute in general average in respect of the coals consumed, on the ground that the working of the engines was not a general average act, and the damage sustained by them not a general average loss; so that, on the same principle, the value of the coal was not a subject for general average contribution.

1894. Oct. 30. The case was argued on an agreed statement of facts, to which were appended the policy of insurance effected by the plaintiffs with the defendants for twelve months from

March 9, 1892, of the hull, materials, machinery, boilers, &c., of the *Bona* (valued at 25,000*l.*) in the sum of 3000*l.*, against the ordinary marine risks, including payment of general average charges according to York-Antwerp Rules—the bill of lading, dated January 7, 1893, under which the cargo was carried, and which contained the clause, "General average shall be adjusted according to York-Antwerp Rules, 1890"—the average statement dated July 27, 1893, containing extracts from the protest and survey reports, and a print of the York-Antwerp Rules, 1890 (1), signed by the solicitors for the parties; but the plaintiffs did not admit that these rules were relevant or material.

Sir R. E. Webster, Q.C., and *H. Holman*, for the plaintiffs.
Joseph Walton, Q.C., and *Carver*, for the defendants.

Cur. adv. vult.

Nov. 13. THE PRESIDENT (SIR F. H. JEUNE). In this case the question which I have to decide is whether the coal consumed to work the engines which were used while the *Bona* was on Galveston Bar is the subject of general average contribution. The cost of repairs to the engines rendered necessary by their being strained in such use has been allowed in the average statement, and, having regard to the express provisions of the York-Antwerp Rules of 1890 on this subject, and to the reference made to those rules in the policy and bill of lading, probably the cost of these repairs could not be excluded from general average in the present instance. But I understand that the parties do not desire that this inclusion of the expenditure on the engines should be held to conclude the question of the coal, and, in any case, it seems to me that the question whether the cost of the coal is to be treated as general average depends

(1) York-Antwerp Rules, 1890:—
Rule vii.: "Damage to engines in refloating a ship. Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shewn to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

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on the principle upon which the cost of repairs to the engines is held, if it be held, to be the subject of general average.

It is necessary, therefore, to consider the principle by which a claim to treat damage to engines, caused by their use in the attempt to relieve the position of a stranded vessel, as general average is to be tested. The question, as one of English law, appears to me to be governed by decided cases, and therefore it is not necessary to refer to the earlier authorities, to foreign law, or to the views of text-writers.

Two of the elements of general average—a common peril, and an act done for the common advantage of the adventure—are beyond question present in this case. The third element which is necessary is that of sacrifice—a term which implies that voluntary or intentional character in the act, which has been held to be essential. Where it is part of the cargo, which has been dealt with while a vessel is at sea for the general advantage, no question is likely to arise on the point of sacrifice. The destruction or abandonment, or employment for some purpose connected with the navigation of the ship, of any part of the cargo, at once impresses the act with the needful characteristic of a sacrifice; but where the subject is part of the ship's equipment it is more difficult to determine whether the act does or does not give rise to general average. There are cases, such as the cutting away of a mast, when it is clear that there is a destruction of part of the ship's equipment for the common advantage. The question in each case is whether the loss incurred was unavoidable, then or soon thereafter, or whether it was so far avoidable that it was accepted in order to save the ship and cargo, and so became a sacrifice: see *Shepherd* v. *Kottgen.* (1) But there are cases where the advantage is gained, not by the destruction or abandonment, but by the employment of part of the ship's material. What is the test in that case? It is, I think, whether the employment is in its nature of an ordinary or extraordinary kind; and it must be observed that though there cannot well be a use of the ship's equipment extraordinary in its nature, under ordinary circumstances, there may be a use ordinary in its nature under extraordinary

(1) 2 C. P. D. 585.

circumstances. The terms "abuse" or "misuse" of the ship's equipments have been employed to express such an abnormal or unnatural use as giving rise to an average act.

In the well-known instance quoted by Abbott from Emerigon of a boat sent adrift with a lantern on a mast in order to mislead a pursuing enemy, we have a simple case of misuse of part of the equipment of a ship which gave rise to general average contribution. In *Birkley* v. *Presgrave* (1) we find the same principle applied in circumstances more nearly akin to the present. There, in order to secure a ship to a pier when it was all-important to do so instantly, not only were the ship's hawser and towing-line employed, but the cable on the bower anchor was cut and used for the purpose. It was held that a claim for contribution did not arise in respect of the hawser and towing-line, because they were used only for the ordinary purpose of such articles, but did arise in respect of the anchor cable, because it was cut from its anchor and employed for a purpose for which it was not intended. "All those articles," Lord Kenyon said, "which were made use of by the master and crew upon the particular emergency and out of the ordinary course, for the benefit of the whole concern, must be paid proportionately as general average." It is clear that by the words "out of *the* ordinary course" Lord Kenyon meant "out of *their* ordinary course"—that is to say, in a manner unnatural for them; and, so read, the words of his Lordship appear to me to express the test necessary for the decision of the question which I am now considering. I think that Mansfield C.J., in *Covington* v. *Roberts* (2), summed up the view taken in *Birkley* v. *Presgrave* (1) by saying that in that case the cable was sacrificed.

The case of *Harrison* v. *Bank of Australasia* (3) and that of *Robinson* v. *Price* (4) afford an illustration of the above principle. In the former of these cases ship's spars and wood, part of the ship's stores, were used as fuel for the donkey-engine engaged in pumping the ship. The Court was equally divided upon the question at issue, because while it appeared to Kelly C.B. and Bramwell B. that the facts shewed an imminent peril,

(1) 1 East, 220.
(2) 2 B. & P. (N. R.) 378.
(3) Law Rep. 7 Ex. 39.
(4) 2 Q. B. D. 91.

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requiring the sacrifice of the spars and wood, Martin B. and Cleasby B. were of a different opinion on this point. I think it must be admitted that the reasoning of Cleasby B. negatives the right to general contribution even if a reasonable supply of coals for the donkey-engine had been provided; but the judgments, not only of Kelly C.B. and Bramwell B., but also, apart from the question of the imminency of the peril, that of Martin B., admit the right to general average contribution. In *Robinson* v. *Price* (1) ship's spars and wood, part of the cargo, were used for the donkey-engine in circumstances of imminent peril, and when it was made clear that there had been a reasonable supply of coal for the donkey-engine on board, the Court (constituted by Mellor and Lush JJ.) held that the consumption, both of the ship's spars and the part of the cargo, was to be contributed to as general average. The diversion of the ship's spars from their proper object would appear to have constituted the sacrifice in both these cases.

On the other hand, the authorities are clear that where the equipment of the ship is employed for its ordinary purpose, though it may be under circumstances requiring unusual demands upon it, there is no sacrifice and no right to general contribution.

In *Covington* v. *Roberts* (2) injury done to a ship and her mainmast in carrying press of sail to escape from a privateer was held not to be a subject of general average, on the ground that there was no sacrifice, but only a common sea risk. The circumstances were extraordinary, but the use of the ship and mast was not. In *Power* v. *Whitmore* (3), on a similar principle, a claim of general average was refused in respect of damage to the ship and tackle caused by standing out to sea in tempestuous weather, when press of sail was necessary in order to avoid an impending peril of being driven on shore. Lord Ellenborough distinguished the case from that of *Plummer* v. *Wildman* (4), where a master cut away his rigging to preserve the ship, on this ground, that "general average must lay its foundation in a sacrifice of part for the safety of the rest," and said that the damage

(1) 2 Q. B. D. 91.
(2) 2 B. & P. (N. R.) 378.
(3) 4 M. & S. 141.
(4) 3 M. & S. 482.

incurred while standing out to sea was not an object of contribution. *Taylor* v. *Curtis* (1), where a claim for contribution in respect of ammunition expended and wounds of seamen incurred in a conflict was rejected, is another illustration of the same principle. The Court held that "no particular part of the property was voluntarily sacrificed for the protection of the rest." The consumption of ammunition is the result of the natural use of guns, and wounds to combatants are the natural result of a combat.

In the present case I think that there was a sacrifice of the engines within the principle above indicated. In the language of the York-Antwerp Rules of 1890, the damage to them was shewn to have arisen from an actual intention to float the ship for the common safety at the risk of such damage. The engines were worked ahead and astern, no doubt, to prevent the vessel settling in the sand, and were used when the vessel was stranded in order to force her off. This was not an ordinary or natural use of the engines. I do not of course say that the using of the engines of a vessel when just touching the ground would lay the foundation of a claim for general average: that would not be an abnormal employment of the vessel's steam-power, nor would there be imminent peril. But that is not the present case.

In the above view, it seems to me to follow that the coals consumed in working the engines while the vessel was stranded should be the subject of contribution; such a use of the coal was abnormal, just as the working of the engines was abnormal. If the claim for damage to the engines was based on their being used with a pressure of steam or a number of revolutions unusual in character, it might be that such a claim could extend only to a portion of the coal expended; but here the use of the engines at all was, under the circumstances in which they were used, extraordinary, and constituted a general average act; and if that be so, it is, I think, clear—and, indeed, it was almost conceded in argument—that there must be contribution for the coal consumed.

The case of *Wilson* v. *Bank of Victoria* (2) may be referred to as shewing that the cost of coal consumed depends on the

(1) 6 Taunt. 608. (2) Law Rep. 2 Q. B. 203.

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nature of the use to which the engines driven by its consumption are applied. In that case it was held that the freighters had a right, without contribution, to the services of the auxiliary screw, and therefore to disbursements required to provide the necessary fuel, on the ground that the expenditure in respect of which contribution is claimable must be not only extraordinary in amount, but incurred to procure some service extraordinary in its nature. Here the service which the coal was expended to provide was extraordinary in its nature.

I am of opinion, therefore, that there must be judgment for the plaintiffs with costs on the High Court scale, for such an amount as, if not agreed upon between the parties, shall be ascertained by the registrar.

On appeal,

1895. Feb. 1. *Joseph Walton, Q.C.*, and *Carver*, for the appellants (defendants). The learned judge in the Court below has held that the coal, used in working the engines to get the vessel off, is to be charged to general average; but it is submitted that the coals were used for their ordinary purpose, and that the cargo owner is entitled in return for the freight paid to such a use of that portion of the ship's materials, for "a shipper of cargo is entitled in time of peril to the benefit, not only of the best services of the crew, in order to save his goods, but of the use of all the appliances for that purpose with which the ship is provided": per Lush J. in *Robinson* v. *Price*. (1)

It is true that, as the York-Antwerp Rules, 1890, are incorporated in the policy and in the bill of lading, the damage to the engines is made the subject of general average by special contract; but even if it be the case that the damage to the engines is a general average loss, that will not affect the question as to the coals, for the damage to the engines did not occasion any extra consumption of coal.

[LORD ESHER M.R. To try the question as to the coals, it is necessary to try the question as to the engines apart from the York-Antwerp Rules.]

(1) 2 Q. B. D. 91, at p. 95.

Yes, and the President has done so. He has held that though no unusual pressure be put upon the engines, yet the use of them in getting off the bar was extraordinary and constituted a general average act; but to found a claim for general average there must be an extraordinary use of the equipment of the vessel, in the sense of a use for which they were not designed; it is not enough that on an extraordinary occasion they were used for the purpose for which they were intended.

In Arnould on Marine Insurance, 2nd ed. p. 901, it is pointed out that the sacrifices and expenses, from which the claim to general average contribution arises, must be of an extraordinary nature—that is, they must be over and beyond those ordinary duties and ordinary expenses of the navigation to which the shipowner is bound by the nature of the contract between himself and the freighter, and for which he is to be remunerated by the freight; so Benecke on Marine Insurance, p. 183, says: "When a vessel is in a perilous situation, it is the master's duty to use all endeavours to extricate the ship and cargo intrusted to his care from such peril, and if in so doing sails are blown away, masts are sprung, or the hull of the vessel injured, this cannot entitle him to restitution, because he has done no more than he was bound to do"—in other words, the owners of cargo are not to be called upon to pay as general average what, according to circumstances, either belongs to particular average on the vessel, and as such is to be borne by the underwriter, or what ought only to be considered as wear and tear.

[LORD ESHER M.R. referred to Phillips on Insurance, s. 1297.]

The law in America varies in different States, and, on the whole, like the law of some of the countries of the Continent of Europe, puts a liberal construction upon cases of this description, and adjusts them as general average. Phillips, however, says in the paragraph in question, as to the loss of spars and sails by carrying a press of sail to keep off a lee-shore or escape from an enemy, that the doctrine of some well-informed insurers is that "any loss, although it happen in consequence of what is thus voluntarily done, and for the general safety, is considered as not coming strictly within the conditions of a general average, but

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—if not wear and tear—rather belongs to the class of particular average, which is often a consequence more or less remote, of what is voluntarily done in the course of navigating the ship," and he cites as an authority the case of *Covington* v. *Roberts*. (1) That was a decision of Sir James Mansfield C.J. in 1806, and was followed by *Power* v. *Whitmore* (2), a decision of Lord Ellenborough C.J. in 1815. These two cases are conclusive of the present case, for they lay down that a claim to general average contribution does not arise when the shipowner, in order to save the ship under circumstances of danger, resorts to hazardous manœuvres which result in the destruction of some part of the ship, as in carrying away sails or springing a mast, in attempting, under a press of canvas, to escape an enemy or a lee-shore, the principle involved being that the manœuvre only consists in the employment of the ship's tackle for one of the known and usual purposes of navigation, and therefore they fall within the scope of those ordinary exertions to which the shipowner is bound by his contract with the freighter.

[LORD ESHER M.R. This Court would not be disposed to extend *Covington* v. *Roberts*. (1) It is also to be observed that in that and the other case cited the ship was being navigated in the ordinary way; but here the vessel was stranded, and in imminent danger of being lost unless extraordinary exertions were made by those in charge of her.]

No doubt; but the principle involved is the same, for no part of the ship was sacrificed for the general safety, so as to constitute a general average loss, as in the case of masts being cut away, anchors heaved overboard, cables cut, or ship's stores jettisoned, in order to save the whole adventure. If any part of this ship or her tackle had been applied for the common benefit to some purpose different from its ordinary use, then the loss so arising would be a general average loss: instances of this would be of spars being cut up to construct a rudder, or sails and cordage used to stop a leak, or where the master, in a difficulty, cut the cable of his best-bower anchor: *Birkley* v. *Presgrave*. (3)

In *Wilson* v. *Bank of Victoria* (4) it was held that the ship-

(1) 2 B. & P. (N. R.) 378.
(2) 4 M. & S. 141.
(3) 1 East, 220.
(4) Law Rep. 2 Q. B. 203.

owners, by the contract of affreightment on a sailing ship fitted with auxiliary screw power, could not charge the cost of the coals against shippers of cargo as general average, but were bound to give the services of the screw and to make all the necessary disbursements for fuel, although the circumstance of her being dismasted caused those disbursements to be extraordinarily heavy.

In *Harrison* v. *Bank of Australasia* (1) the shipowners' claim from the owners of cargo for a general average contribution was rejected by the whole Court in respect of extra coal obtained from a passing vessel and consumed in working a donkey-engine for pumping the vessel, which leaked from straining occasioned by the bad weather she encountered.

It is submitted that it follows from these cases that the working the engines under the circumstances of this case is not a general average act, for the cargo-owner is entitled to call upon the shipowner to use his engines to get the ship off. The coals consumed are not the subject of general average contribution, for there was no abuse of the equipment of the ship, as would occur if bunker coal had been thrown overboard to lighten the vessel. The coal was used, and destroyed in using, in the ordinary way in which the coals were intended to be used, whether the ship was partly on the ground or in sufficient water to float her. There is no case in the books in which the use of the ship's appliances in the ordinary way, though under extraordinary circumstances, has been held to give rise to a general average contribution. The agreed statement of facts finds that while the steamship lay stranded on the bar her engines were from time to time "properly employed" in the attempt to get her off the bar into deeper water. This the cargo-owner was entitled to, including the fuel consumed in working the engines, for to make the use a general average sacrifice there must be something extraordinary in the manner of the use—something amounting to an abuse; but here nothing belonging to the ship was applied to a use different from that to which it would be applied in the ordinary course of navigation.

[The case of *Hallett* v. *Wigram* (2) was also referred to.]

(1) Law Rep. 7 Ex. 39. (2) 9 C. B. 580.

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Sir R. E. Webster, Q.C., and *H. Holman*, for the respondents (plaintiffs). The vessel was aground from 1 P.M. on January 11 until 1 P.M. on the 14th. During that time the engines were put to unusual strain, and sustained a considerable amount of damage in the efforts made, at last successfully, to get the vessel off. This was extraordinary work, not done in the course of the voyage, and the risk of damage to the engines was voluntarily incurred by the master in the interests of all concerned—that is, in the language of the York-Antwerp Rules, and of the rules of practice adopted by the Association of Average Adjusters (1), there was an actual intention to float the ship, for the common safety, at the risk of damage to the machinery. This amounted to a general average act, and it is submitted that the case of the coals is even stronger than that of the engines, for as the vessel had to be lightened whilst on the bar, it cannot be disputed that, if the fifty-two tons had been thrown overboard, their cost would have been the subject of general average, and their voluntary sacrifice by the master for the purpose of working the engines amounts to the same thing. It is desirable in these cases that the master should act for the best interests of all, without regard to the consequences; but this principle—which is based on a supposed bargain, between the master and the owners of the cargo, at the moment of danger, involving an undertaking to make rateable compensation in case safety shall be attained—cannot be carried out if the master, supposing the cargo-owner to have been alongside in a tug, could not insist upon the latter agreeing that the damage sustained by the abnormal user, at the risk of destruction, of the equipment of the ship, in the effort to refloat her, should be on general average terms.

This view that, by English law, the loss in question is the subject of contribution, as being in excess of the shipowner's duty under his contract, does not conflict with any principle governing general average laid down by the authorities. It is

(1) Rules of practice adopted by the Association of Average Adjusters:—

"Stranded vessels. Damage to engines in getting off.—That damage caused to machinery and boilers of a stranded vessel in endeavouring to refloat be allowed in general average when shewn to have arisen from an actual intention to float the ship at the risk of such damage."

consistent with the definition given by Lawrence J. in *Birkley* v. *Presgrave* (1), and Blackburn J., in delivering the judgment of the Court in *Wilson* v. *Bank of Victoria* (2), said that though the disbursements in the circumstances of that case did not render them an extraordinary expenditure within the rule as to general average, the case was not that of "any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature." In *Covington* v. *Roberts* (3) there was no decision which will support the appellants' contention, because, in that case, there was only, in the words of Sir James Mansfield C.J., "a common sea risk," and nothing given up for the benefit of the whole concern.

In Parsons on Marine Insurance (4), the distinction is drawn between expenses incurred for the common benefit but belonging to the navigation of the vessel, and not within the law of general average, and expenses of a similar character incurred, as in this case, because an extraordinary peril which involves all the property in a common danger made these expenses necessary for the benefit of all that property.

Joseph Walton, Q.C., in reply. An increased user is not sufficient to make the case one of general average, and, therefore, in *Power* v. *Whitmore* (5), Abbott, arguing for the plaintiffs, gave up the point in respect of the damage done to the ship by standing out to sea and carrying a press of sail, in order to avoid an impending peril, saying (6) that the case so much resembled *Covington* v. *Roberts* (3) that he could not ask for contribution.

The cargo-owner pays freight for a vessel with steam-power adequate to such purposes as crossing this bar under difficulties; for it is in the contemplation of both parties on a voyage of this description that such impediments to the navigation may be encountered.

The vessel was not aground astern, so that the propeller was working in water, and the coal was only consumed in the

(1) 1 East, 220, at p. 228.
(2) Law Rep. 2 Q. B. 203, at p. 212.
(3) 2 B. & P. (N. R.) 378.
(4) 1868, vol. ii. p. 254.
(5) 4 M. & S. 141.
(6) 4 M. & S. 141, at p. 146.

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ordinary way—to work the engines and drive the propeller round in a yielding medium. Even though the expenses were incurred for the common benefit, that will not relieve the shipowner from the duty he lies under to incur expenses for the navigation of the vessel, arising from his obligation to carry the goods safely to their destination.

LORD ESHER M.R. The question here is confined to the matter of the coals; but I agree that the point whether these coals were used under circumstances which enable the ship master to demand a general average contribution must depend upon what they were used for and how they were used. I think if they were used for the purpose of moving the engines in such a way and under such conditions that any damage to the engines would be subject-matter of general contribution, then the coals used as a part of that manœuvre would be in the same position as the engines.

The case, therefore, admittedly depends upon whether the use of the engines in this case was a normal or ordinary mode of using them, or whether the engines were used, not only under unusual circumstances, but in an unusual and abnormal manner.

In considering what are the conditions under which either the shipowner or the cargo-owner can demand a general average contribution, it will be better to confine myself to the case of the shipowner, because, practically, that is the case before us. The shipowner, if he insists that the cargo-owner is bound to contribute in general average, must shew that the ship has been in some way injured, that the ship and cargo were both in danger, and that the injury to the ship happened in consequence of an intentional putting her into the danger of injury for the purpose of attempting to save both ship and cargo. Here it is admitted that the ship and cargo were in danger; and it is of no use, therefore, to argue about a case where a ship may touch a sandbank or be on a sandbank without danger to ship or cargo. A ship may be in that condition, and then the main circumstance on which to raise a general average contribution does not exist; but here, not only was the vessel on the bar, but she was so fixed in the sand that both ship and cargo were in imminent danger.

The captain of the ship is there to do what he ought to do for

the benefit of both shipowner and cargo-owner, and his duty is to do everything that he can do to save both ship and cargo. That is undoubted. The ship was aground, and had been so for several days. She was so far aground that she could not be got off without some extraordinary effort. It is found here that what the captain did he did with the intent to endeavour to save both ship and cargo. It really is not disputed that he was intentionally running a great risk of injury to the machinery. He was attempting intentionally to do what he knew to be a dangerous operation. But it is said that he only used the ship and her powers, and that however much he did that, if he only used the ship and her powers in the ordinary way in which a ship and her powers are to be used, then it cannot be brought within the doctrine of general average. I agree to that. That doctrine will solve some of the cases which have been brought before us, and I am not going to overrule any case; but I am dealing with the case of a ship hard and fast on the ground. That is not the normal condition of the ship. The normal condition of the ship is to be—except in mud harbours—afloat in the water. The manœuvre which this captain determined to follow, knowing that it was a dangerous manœuvre to the property of his owners, was to use the engines so as to force the ship off the ground. Is that a normal way of using steam-engines on board the ship? Counsel for the appellants with great ingenuity said the screw was in the water. It was not the screw which was strained, but the engines. The engines have got to force themselves round so as to turn this screw, whilst the ship, instead of being afloat, and therefore a moving mass, is hard and fast on the ground. The learned judge who tried this case has come to the conclusion that if you use engines to force a ship either one way or the other when she is hard and fast on the ground, that is not using engines in the manner in which they were made to be used. They were made to be used to move the ship when afloat, and not when on the ground. He has come to the conclusion that to use the engines when the ship is hard aground is a very excessive and abnormal mode of using the engines, with a result of much greater danger to the engines than if they are used in the

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normal way. Therefore, that is not using the ship and her equipment in the ordinary way. It is putting them to an abnormal use intentionally, knowing the risk, for the purpose of saving the ship and cargo from the imminent danger in which they were.

It seems to me that that state of things, taking them together, supplies all the conditions which would, if the engines were strained, entitle the owners of the ship to say that they intentionally put their engines to this abnormal risk for the purpose of attempting to save the ship and cargo, and that by doing so they had saved them.

The coal was used for the purpose of working the engines in that abnormal way. Coals, in being used to move engines in that abnormal way, are used as part of that abnormal way, and, therefore, I think in this case the shipowner is entitled under the circumstances to general average contribution. The shipowner is bound to shew that the ship and cargo were in danger of being lost, and bound to shew that what he did was an abnormal use of the means he had under his hands—an abnormal use of the ship and things belonging to the ship. I think he has done that; and I think, therefore, that the judgment in the Court below must be upheld, and this appeal dismissed.

LINDLEY L.J. This case is somewhat difficult, and I do not think it is covered by any authority. It is not like any case in the books, so far as I know.

The question is, whether, in the circumstances of this case, the defendants are liable to contribute in general average in respect of fifty-two tons of coal used in working the engines for the purpose of getting the ship off Galveston Bar. I look upon the coals as accessory to the engines, and it appears to me that the real question is, whether there was an extraordinary sacrifice. I think there was, and that it comes within the definition given by Lawrence J. in *Birkley* v. *Presgrave* (1), namely, "all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo."

The question is: What is an extraordinary sacrifice? It has

(1) 1 East, 220, at p. 228.

been contended by counsel for the appellants that, as a matter of law, you cannot sacrifice anything if you use it for the purposes for which it is intended. I doubt that. Let us consider the position of affairs. The agreed statement of facts shews that the ship was hard and fast on this bar, and had been there for several days. Was there any sacrifice at all? Was there any risk intentionally run in working these engines far beyond their power? Certainly there was. And for what purpose? For the purpose of assisting the ship off the bar. Are we then to say that, in point of law, that was not an extraordinary sacrifice? It has been contended that the propeller revolved in water, which was its ordinary use, and that the case is governed by *Covington* v. *Roberts* (1) and *Power* v. *Whitmore* (2); but in both of those cases the ships were afloat, and a press of sail was carried in one case to escape from a privateer, in the other to get out of the proximity of land. This case is different: the screw was not used to navigate the ship afloat, but to get her afloat, which was an extraordinary purpose. If we look at the matter as business men this use of the engines may be fairly regarded as an extraordinary sacrifice, and there is no law to prevent it from being so regarded. The appeal must be dismissed.

RIGBY L.J. I agree that the cost of the coals in this case is the subject of general average contribution. It was not in contemplation that the engines should be put to the unusual strain which led to their damage under the circumstances set out in the agreed statement of facts. I do not say that some perils of the sea may not render it necessary to use the engines beyond their normal power; but here, the ship and cargo being in danger, whilst the ship lay stranded on the bar, vigorous efforts had to be made to try and get the ship off. For that purpose they had lightened the ship, and apparently thereby increased the danger because she bumped about, and the engines were used for the safety of ship and cargo in a way in which it was never intended that they should be used. I think, therefore, the use of them under these circumstances comes within the rule of

(1) 2 B. & P. (N. R.) 378. (2) 4 M. & S. 141.

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general average, and I do not see anything in the cases cited to conflict with that view.

Appeal dismissed.

Solicitors for plaintiffs: *Downing, Holman & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

T. L. M.

1894

Nov. 10; *Dec.* 4.

[DIVISIONAL COURT.]

THE TYNWALD.

Admiralty—County Court—Practice—Collision—Trial by Judge with Assessors and/or Jury—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 10, 11—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.

The plaintiffs, owners of a flat, instituted an action in personam, in the sum of 275*l.*, under the Admiralty jurisdiction of a county court, against the defendants, the owners of a steamer, for damages for injuries to their flat by collision with the defendants' steamer, and on the demand of the plaintiffs, under s. 101 of the County Courts Act, 1888, the registrar gave the defendants notice that the action would be tried by a jury. The defendants filed a request, under s. 10 of the County Courts Admiralty Jurisdiction Act, 1868, that two nautical assessors be summoned to assist the judge at the hearing of the action, and, on an application to the judge for directions as to the mode of trial, the county court judge held that, if a jury were asked for, he was obliged to allow the case to be so tried. On appeal by the defendants:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Bruce J.), reversing the decision of the county court judge, that the exception in s. 10 of the Act of 1868 as to the trial of Admiralty causes of salvage, towage, and collision limited the general provisions of s. 101 of the Act of 1888, so that in an Admiralty cause of collision, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors.

APPEAL by defendants from a decision of the judge of the county court of Lancashire, holden at Liverpool, in favour of the right of the plaintiffs to have an Admiralty action of damage by collision tried with a jury.

On September 12, 1894, a summons in an Admiralty action in personam for damages by collision in the sum of 275*l.* was taken out in the county court at Liverpool by the plaintiffs, the owners of the flat *Gibson*, against the defendants, the Isle of Man Steam Packet Company, Limited, owners of the screw steamer *Tynwald*,

and on September 19 the registrar gave the defendants notice that, on the demand of the plaintiffs, the action would be tried by a jury. On September 21 the defendants filed a request for nautical assessors to be summoned to assist the judge at the hearing of the action, and the defendants gave the plaintiffs notice that an application would be made for directions as to the mode of trial. On the hearing of that application the learned county court judge made no order on the ground that under ss. 10, 11 of the County Courts Admiralty Jurisdiction Act, 1868 (1), the defendants had the right to request that the judge should be assisted by two nautical assessors to advise on any question of seamanship, and that, as the amount claimed exceeded 5*l.*, he could not refuse the demand of the plaintiffs under s. 101 of the County Courts Act, 1888 (2), to have a jury summoned for the trial of questions of fact involved in the action, but he gave the defendants leave to appeal.

1894. Nov. 10. *Sir Walter Phillimore*, and *Steel*, for the appellants (defendants), in support of the request for assessors, contended that that request negatived the right to a jury, as by the presence of assessors advising the Court on nautical questions the evidence of experts was excluded, and, therefore, the jury would not have the requisite evidence of facts on which to found their verdict.

(1) 31 & 32 Vict. c. 71, s. 10: "In an Admiralty cause in a county court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in county courts; save and except that in any Admiralty cause of salvage, towage, or collision the county court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors."

Sect 11: "In any such Admiralty cause as last aforesaid it shall be lawful for the judge of the county court, if he think fit, and he shall, upon request of either party, summon to his assistance in such manner as general orders shall direct, two nautical assessors, and such nautical assessors shall attend and assist accordingly."

(2) 51 & 52 Vict. c. 43, s. 101: "In all actions where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice. . . ."

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Joseph Walton, Q.C., and *Horridge*, for the respondents (plaintiffs), in support of the demand for a jury, contended that this demand must prevail, as the Act of 1888 had been held by this Court in *The Eden* (1) and in *The Hero* (2), and by the Court of Appeal in *The Delano* (3), to apply to Admiralty causes, and, therefore, the county court judge had no discretion, s. 101 of that Act giving an absolute right qualified only by the reference to Chancery cases. The presence of a jury was not inconsistent with the nature of an action of damage by collision, as it had been the common practice in the Queen's Bench to try collision cases with a jury. Under s. 11 of the Admiralty Court Act, 1840, the Court of Admiralty had power to direct a trial of issues of fact by a jury in a Court of Common Law, and quite recently an action in rem for damage by collision was tried in the Admiralty Division with a jury. (4) If assessors were also summoned, no practical inconvenience would result, as the jury would decide the questions of fact, and, to assist them in doing so, the judge would inform the jury what answers the nautical assessors—as the impartial witnesses selected by the Court—gave on the questions of nautical skill submitted to them.

[In addition to the cases mentioned in the judgments, the following were referred to: *The Princess Royal* (5); *Reg.* v. *Judge of Southend County Court* (6); *Scovell* v. *Bevan* (7); *The Temple Bar* (8); County Court Rules, 1889, Order v., r. 1a; Order vii., r. 1; Order xxxix. B., rr. 4, 5, 8, 58.]

Cur. adv. vult.

1894. Dec. 4. THE PRESIDENT (SIR F. H. JEUNE). In this case a question arises as to the mode of trial in a county court of a cause of collision within the Admiralty jurisdiction of the Court. It is whether, where one party asks for a jury and the other party asks for assessors, the trial should be by a judge and jury, by a judge and assessors, or by a judge, jury, and assessors. The

(1) [1892] P. 67.
(2) [1891] P. 294.
(3) [1895] P. 40.
(4) The case of *The Ibis* (1893 S. No. 3256. Fol. 400) was tried by Gorell Barnes J. and a special jury of the county of Middlesex, on March 13, 14, 15, 16, 17, and 19, 1894.
(5) Law Rep. 3 A. & E. 27.
(6) 13 Q. B. D. 142.
(7) 19 Q. B. D. 428.
(8) 11 P. D. 6.

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learned judge of the county court has decided in favour of the third of these modes of trial, and, accordingly, he has expressed no opinion as between the other two.

The question turns on the construction of the County Courts Admiralty Jurisdiction Act of 1868, and the County Courts Act of 1888.

By the former of these Acts jurisdiction was given to the county courts to try Admiralty causes, and by the 3rd section of the Act claims relating to salvage, towage, necessaries, wages, damage to cargo or damage by collision were enumerated as Admiralty causes. By ss. 10 and 11 of the Act it was provided: [The learned judge read the sections and continued:—]

The effect of these two sections appears to me to be clear, so far as is necessary for the decision of this case. With regard to Admiralty causes other than causes of salvage, towage, or collision, the cause is to be heard and determined in the same manner as ordinary civil causes are heard and determined in county courts. I do not think it necessary to decide what the phrase "ordinary civil causes" imports. We are dealing with an Admiralty cause of collision, and with regard to Admiralty causes of salvage, towage, or collision the rule appears to me to be clearly laid down by the words of the exception. In these causes the trial is to be by the judge, unless either party, or the judge, desire that there should be assessors, and then it is to be by a judge and assessors.

It is clear that the exception in s. 10 modified any right to a jury which the previous words may be supposed to have given. It could modify such right only in one of two ways, that is to say, by allowing assessors either as an addition to, or in substitution for, a jury. Now, I confess, it seems impossible to suppose that it was intended by the words of this exception to introduce into our judicial system trial by a judge plus assessors plus a jury. The words do not appear to be apt for the purpose, because it is the judge who is to be assisted by assessors, and he is to be assisted by them in the same way as the judge of the High Court of Admiralty is assisted by them. But I cannot for a moment suppose that it was intended by this provision to create

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so novel a tribunal as a judge, jury, and assessors. I am not sure that a jury and assessors are not inconsistent in principle, because assessors exclude expert evidence, at least in the Courts of Admiralty, and a jury is bound to decide according to the evidence, so that they must give a verdict without any evidence on the most material points. The only answer suggested to this is that the advice of assessors, which the judge would, I suppose, convey to the jury, is evidence; but it is not. It is a substitute for evidence. I am sure, however, that the practical difficulties in trying a cause of collision or salvage with a jury as the sole judge of fact would be great. I do not say the thing would be impossible; but it implies a novel system of procedure in the conduct of such a trial on which the Act is wholly silent.

Trial by assessors has, I think, always been regarded by the legislature as an alternative of trial by jury. It is so, I think, under s. 5 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and under s. 103 of the County Courts Act of 1888, and it is so, in terms, under the 6th section of the Employers' Liability Act, 1880, and the Rules of the Supreme Court (see Order XXXVI., r. 7 (*a*)).

It is not worth while further to elaborate this point, because it does not appear that a construction compelling a county court judge to sit with a jury and assessors in Admiralty causes has ever, till this case, been placed on the Act of 1868, and indeed it was only faintly, if at all, suggested before us that such a construction could be maintained. I think, therefore, that it follows that the exception in s. 10 enables any party or the judge, in cases of collision, towage, or salvage, to say that the trial shall be by a judge and assessors, and so the law stood from 1868 to 1888.

But it is said that the language of s. 101 of the County Courts Act of 1888 gives to either party an absolute right to a jury in all actions other than the Chancery cases, which are specially excepted, and that, therefore, if on the view above taken trial by judge, jury, and assessors cannot be supposed to be intended, there must at the demand of a party be trial by judge and jury.

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The words of s. 101 are: [The learned judge read the section and continued:—]

I do not think it is possible to say that the term action, as defined by s. 186—that is to say, "action shall include suit, and shall mean every proceeding in the Court which may be commenced by plaint"—does not include Admiralty causes. Nor does it appear to me that there are any inferences to be drawn from the rules which really throw light on the matter. It is also an argument of force that the single exception of certain Chancery actions appears to shew that the section was intended otherwise to be exhaustive.

It is further clear from the decision of this Court in *The Eden* (1) and in *The Hero* (2), and from the recent decision of the Court of Appeal in *The Delano* (3), that as regards Admiralty causes the Act of 1868, which is not one of those expressly repealed by the Act of 1888, must be read with it.

Must, then, s. 101 of the Act of 1888 be construed to repeal s. 10 of the Act of 1868 and to establish a new rule for the trial of Admiralty causes of collision, towage, and salvage? I do not think that it need be so read, and I think that the exception in s. 10 of the Act of 1868 may stand as an exception to the general provisions of s. 101 of the Act of 1888. I agree that this takes from s. 101 the general application of which the words, in themselves, are capable. But I think that on principles similar to those approved by a majority of their Lordships in the House of Lords, in the case of *Cox* v. *Hakes* (4), especially as stated by Lord Halsbury, a limitation ought to be placed on the generality of the language of s. 101. In that case, although the words of s. 19 of the Judicature Act, 1873, gave in terms jurisdiction to hear appeals from any judgment or order of the High Court, and also made an exception in certain cases afterwards mentioned, it was held that no appeal lay from an order of the Queen's Bench Division in a matter of habeas corpus. The decision may be stated generally to have proceeded on the nature and history of the writ of habeas corpus, and on this ground, that it could not be supposed that the legislature intended by general words to

(1) [1892] P. 67.
(2) [1891] P. 294.
(3) [1895] P. 40.
(4) 15 App. Cas. 506.

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alter the previous procedure without more specific provision than is to be found in the Act. On similar principles it appears to me impossible to suppose that the legislature intended that, whenever any party so desired, Admiralty causes of collision and salvage in county courts should be tried by a jury. Such an enactment would have worked a change more complete than I can believe would have been so carried out. It is true that cases of collision between ships have in some cases been tried at common law by juries, and it is also true that there was a power under the Act of 3 & 4 Vict. c. 65 (though I believe only once employed), to send an issue from the Admiralty Court for trial by a jury; and quite recently my learned brother Barnes J. tried an Admiralty cause of collision, in which no scientific question was involved, with a jury, but the whole matter turned on an alleged conspiracy (1); but, in the Admiralty Court, collision cases have, with this exception, been invariably tried by a judge, and almost invariably by a judge with assessors. It cannot, I think, have been intended, at the option of any party to a cause, not only to bring in a jury, but also (if I am right in thinking assessors and jury incompatible) to oust the assessors, and thus provide for the trial of Admiralty collision cases in the county court in a manner wholly different from that in force in the High Court of Justice. The difficulty appears to me to be greater still as regards salvage cases. An action for salvage services at common law proceeds on a quantum meruit, and I should suppose the compensation would be assessed on the same principles as in any other case of implied contract. But in the Admiralty Court salvage services are remunerated on principles of a very special kind, into which considerations of public policy largely enter, and which do not proceed on any such basis as that of contract between the parties. Such principles have never yet, so far as I know, been submitted to a jury, and it would be extremely difficult, if not impracticable, to submit them to that tribunal.

It is, perhaps, only another way of expressing the views I have just indicated, to say that there is something in the subject of certain Admiralty causes within the meaning of the defi-

(1) See the case of *The Ibis*, ante, p. 144, note (4).

nition clause of the Act of 1888 (s. 186) repugnant to the inclusion of such causes in the actions referred to in s. 101 of that Act.

For these reasons, I think that in an Admiralty cause of collision in a county court, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors.

The judgment of the county court must accordingly be reversed.

BRUCE J. I agree with the President, and perhaps I might be content to add nothing to the judgment he has delivered; but as I have arrived at the same conclusion by a somewhat different method, it is, I think, right that I should state my reasons for concurring in his judgment.

In order to arrive at a right conclusion as to the construction of the County Courts Act, 1888, we must consider the earlier statutes.

The Act of 1868 (31 & 32 Vict. c. 71), conferring Admiralty jurisdiction on the county courts, enacts with reference to the trial of an Admiralty cause in a county court: [The learned judge read s. 10, and continued:—] By the 34th section of the same Act it is enacted that the Act "shall be read as one Act with so much of the County Courts Act, 1846, and the Acts amending or extending the same, as is now in force." The 69th section of the County Courts Act, 1846, above referred to (9 & 10 Vict. c. 95), enacts "that the judge of the county court shall be the sole judge in all actions brought in the said Court, and shall determine all questions as well of fact as of law, unless a jury shall be summoned as hereinafter mentioned. The 70th section of the last-mentioned Act enacts that "in all actions where the amount claimed shall exceed 5*l.* it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the action; and in all actions where the amount claimed shall not exceed 5*l.* it shall be lawful for the judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury." The 28 & 29 Vict. c. 99, conferred on the county courts a limited equitable jurisdiction, and by s. 1 of that Act the county courts were given all the powers

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and authority of the High Court of Chancery in the suits or matters which fell within the equitable jurisdiction so conferred.

It followed, therefore, that as the Court of Chancery had in certain cases the power to summon a jury for the trial of certain matters, the county court, in the exercise of its equitable jurisdiction, had a similar power; but as in the Court of Chancery the usual mode of trial was by the judge alone, so also in equity proceedings in the county court the usual mode of trial was by the judge alone. The 24 & 25 Vict. c. 134, which in 1861 regulated the proceedings in Bankruptcy, conferred by the 3rd section upon the judge of every county court, other than the metropolitan county courts, the jurisdiction in Bankruptcy previously vested in the Commissioners of the District Courts of Bankruptcy. And I cannot find that any provision was in force at the time for the trial of bankruptcy matters by a judge and jury. There was, therefore, vested in the county courts, at the time of the passing of the County Courts Admiralty Jurisdiction Act, jurisdiction to hear and determine civil causes of various kinds. There can, I think, be no doubt that the phrase "civil causes" is wide enough to comprehend all the various matters included in the jurisdiction of the county courts. Lord Selborne, in the case of *Green* v. *Lord Penzance* (1), says of the word "cause": "It is not a technical word signifying one kind or another, it is causa jurisdictionis, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court."

What, then, is the meaning of the provision of the 10th section of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that Admiralty causes shall be tried in like manner as ordinary civil causes?

It would, I think, be putting a very narrow and strained construction upon the words "ordinary civil causes" to hold that they applied only to common law causes; they obviously, as it seems to me, apply to all the causes or matters over which the judge ordinarily exercised jurisdiction. Then, if these words apply to all classes of causes, in what manner were such causes heard and determined? The "manner" no doubt refers to the

(1) 6 App. Cas. 657, at p. 671.

procedure of hearing causes in a summary way without pleadings; but I think it also refers to the mode of trial, and as the mode of trial is now the matter to be determined, we must consider what was the mode of trial common to all classes of cases. The only mode of hearing and determining common to all classes of cases was the hearing and determining by the judge alone.

In some common law actions a jury might be demanded by either of the parties, and in some causes on the equity side the Court in its discretion might order a trial by judge and jury. But unless special application was made by either party, the judge himself determined all matters brought into Court, and many of the matters brought into Court could not in any case be determined save by the judge alone.

I think, therefore, that where in the first part of the section the legislature referred to the manner in which ordinary civil causes were then heard and determined in county courts, it meant to refer to the hearing and determining of causes by the judge alone. That was the ordinary manner of trial: it was the method by which many causes could alone be tried, and by which all causes were tried in the absence of any special application by one of the parties. But for the purpose of the question now before the Court, it is not, I think, necessary to rest upon the earlier words of the section alone. The provision for the judge being assisted by nautical assessors is, as it seems to me, absolutely inconsistent with trial by jury. The section provides that the judge shall, if he think fit, or on the request of either party, be assisted by nautical assessors "*in the same way* as the judge of the High Court of Admiralty is now assisted by nautical assessors." But if the judge is not to determine the facts, it is difficult to understand how assessors could assist him: certainly they could not assist him in the same way as assessors assist the judge of the Court of Admiralty.

Assessors could not assist him in charging the jury, because the jury can only give their verdict in accordance with the evidence before them, and I apprehend it would be in contravention of their oaths if the jury were to be guided in their verdict by the opinion of the assessors on matters of nautical skill. Questions of nautical skill are matters of fact, not of law, and,

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if they are to be determined by a jury, are matters upon which the evidence of experts should be received; but if these questions are to be determined by a jury upon the evidence of experts there can be no advantage in having assessors. According to the practice of the Admiralty Court, where the judge is assisted by assessors, evidence is not admissible on points on which it is the province of the assessors to advise the Court: *The Kirby Hall.* (1) One of the great advantages of the presence of assessors is the saving of the expense and difficulties which almost always arise upon the reception of the conflicting evidence of experts on technical questions. For these reasons I cannot resist the conclusion that the legislature, when it conferred the right to have in certain Admiralty causes nautical assessors to assist the judge, intended the mode of trial by judge and assessors to exclude the mode of trial by judge and jury. But apart from these reasons, some of the matters to be tried are from their very nature unsuitable for trial by judge and jury.

It is impossible to suppose that the legislature could have contemplated the trial of a cause of salvage by a judge and jury. What directions would it be possible for the judge to give to the jury as to the principles to guide them in the assessment of the amount of the salvage award? It cannot, I think, be said that the salvage award is to be assessed upon the principle of a quantum meruit, because the causes mentioned in the County Courts Admiralty Jurisdiction Act, 1868, are spoken of as "Admiralty causes," and the very title of the Act is "An Act for conferring Admiralty Jurisdiction." The value of the property salved, the nature of the risk incurred, and all the various elements which have been recognised as fit for the consideration of the Court in awarding salvage, must be dealt with by the tribunal which is charged with the fixing of the amount of salvage reward, and it seems to me incredible to suppose that parliament could have intended to enact that such a question should be determined by a jury.

The County Courts Admiralty Jurisdiction Act, 1868, s. 26, provided that an appeal may be made to the High Court of Admiralty from a final decree or order of a county court in an

(1) 8 P. D. 71, at p. 75.

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Admiralty cause. This right of appeal, which still exists, is not limited to matters of law, but includes matters of fact.

But it would be contrary to all experience and principle to allow an appeal from a finding by a jury on matters of fact.

From 1868 down to the passing of the County Courts Act, 1888, the practice, so far as I can ascertain, was universal to have Admiralty causes in the county court tried before a judge alone, or before a judge assisted by nautical assessors.

The question to be decided is whether the County Courts Act, 1888, which is entitled, "An Act to consolidate and amend the County Courts Acts," operates to abrogate the practice which, founded upon the Act of 1868, regulated up to 1888 the procedure in Admiralty causes.

I may observe in passing that I am not prepared to expect in an Act which is substantially a consolidation Act a change of so vital a character as that involved in the substitution of trial by jury in the place of trial by a judge with or without assessors. But the particular provisions of the statute of 1888 demand consideration.

The 101st section provides that "in all actions where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury . . . unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice."

The word "action" is by the interpretation or supplementary section (186) to mean "every proceeding in the court which may be commenced as prescribed by plaint." This is, I think, wide enough to include an Admiralty cause. But the supplementary section is introduced by a provision that the words used in the statute shall have the prescribed meaning unless there is anything in the subject or context repugnant thereto.

Is, then, the application of the word "actions" to Admiralty causes in the 101st section repugnant to the subject or context? For the reasons I have already given I think it is. I think, therefore, that the interpretation clause does not apply to extend the word "actions" to Admiralty causes, and that the words in the 101st section of the County Courts Act, 1888, have no more application to Admiralty causes than had the same words in the

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70th section of the earlier Act of 1846 which has already been referred to.

But the same result may, I think, be arrived at by another way.

The Act of 1888 by s. 188, sub-s. 3, enacts that "any enactment . . . . referring to any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment in this Act." The 34th section of the Act of 1868 enacts, as before stated, that the Act of 1868 "shall be read as one Act with so much of the County Courts Act, 1846, and the Acts amending or extending the same, as is now in force."

The Act of 1846 and all the Acts amending or extending the same referred to in the Act of 1868, s. 34, are repealed by the Act of 1888.

The County Courts Admiralty Jurisdiction Act, 1868, is therefore to be read as one with the Act of 1888, and as if the Act of 1888 were referred to in the 34th section of the former Act. We therefore find in the earlier of two Acts one special provision giving a complete rule as to the manner of hearing and determining "Admiralty causes," and in the later of the two Acts, which is to be read as part of the earlier Act, a general provision as to the mode of trial of "actions." It would, I think, be contrary to all the recognised principles of interpretation to treat the special provisions of the earlier Act as repealed by the general provisions of the later Act incorporated with it. It is to be observed that it is not merely that the two Acts are to be read as one, but the earlier Act—the Act of 1868—is to be read as if it incorporated the later Act of 1888. It would be doing violence to the rules of construction to hold that the provisions of an Act which specially provides for the trial of "Admiralty causes" by a judge or by a judge assisted by assessors are to be overruled and in many cases rendered nugatory by a general enactment contained in the same Act providing for the trial of "actions" by a judge and jury. See the observations of Lord Selborne in the *Vera Cruz* (1) and the remarks of Lord Westbury in *Ex parte St. Sepulchre.* (2)

The conclusion at which I have arrived is, I think, not in

(1) 10 App. Cas. 59, at p. 68. (2) 33 L. J. (Ch.) 372.

conflict with the decision of this Court and of the Court of Appeal in the case of *The Delano.* (1) That decision was on the 120th section of the County Courts Act, 1888, which section took the place of the 6th section of the County Courts Act, 1875. The last-mentioned section was held to apply to appeals in Admiralty causes, because it was considered that the appeal given by the County Courts Act, 1875, might well co-exist with the mode of appeal provided by ss. 26 and 27 of the County Courts Admiralty Jurisdiction Act, 1868: *The Humber.* (2) The decision in *The Delano* (1), which determined that the word "actions" in the 120th section of the Act of 1888 included all those proceedings which were included in the Act of 1875, was in accordance with the established practice and the previous course of legislation.

Appeal allowed. Action to be heard with assessors, defendants to have the costs of the appeal, the costs below to be costs in the cause.

Solicitor for plaintiffs: *J. W. Thompson, Liverpool.*

Solicitors for defendants: *Bateson, Warr, & Wimshurst, Liverpool.*

(1) [1895] P. 40. (2) 9 P. D. 12.

T L. M.

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Feb. 15, 16, 18, 21.

THE WEGA.

Admiralty—Collision—Duty of Steam Vessel anchoring in Thames—Thames Bye-laws, 1887, *art.* 18, *and* 1892, *art.* 7 (*c*).

The master of the plaintiffs' steamship proceeding, about 7 P.M. in the month of November, up Barking Reach in the River Thames, with a flood-tide of about half a knot, decided to anchor on account of fog. He stopped his engines, put his helm hard-a-port, and, having given the vessel an angle across the river to the northward, set his engines slow ahead, and then full speed astern. When the way was taken off his ship he let go the anchor, and, on a hail from the mate that the anchor was holding, ordered the two side lights and the mast-head light to be taken in, and the riding light to be put up, leaving a stern light, shewing twenty points, still exhibited. The fog during this time had lifted, and the defendants' steamship, coming down the river, seeing the mast-head and red light of the plaintiffs' ship a little on the port bow, ported. The red light then disappeared, and the plaintiffs' steamship was seen to be lying across the river, whereupon the engines of the defendants' ship were reversed full speed, but a collision occurred:—

Held, by Bruce J., that the plaintiffs' steamship was alone to blame, as, when throwing herself athwart the navigable channel, and stopping her way, she was within art. 18 of the Thames Bye-laws, 1887, and was bound to give four or more blasts of the steam whistle in rapid succession, so long as the danger lasted—that is, until she had swung to her anchor. The side lights ought also to have been taken in as soon as the vessel was held by her anchor, and, being over 150 feet in length, the second riding light prescribed by art. 7 (*c*) of the Thames Bye-laws, 1892, should have been duly exhibited at or near the stern.

ACTION of damage by collision.

The plaintiffs were the owners of the British screw steamship *Galatea*—of 348 tons net, and 559 tons gross, register, from Treport to London, with a general cargo, and a crew of thirteen hands—which came into collision, about 7 P.M. on November 21, 1894, in the lower part of Barking Reach in the River Thames, with the *Wega*, belonging to the defendants and counter-claimants, a German screw steamship of 587 tons net, and 966 tons gross, register, from London to Hamburg, in charge of a Trinity House pilot, with a general cargo, nine passengers, and a crew of eighteen hands.

The facts of the collision fully appear from the judgment, and the case is reported only on the question of the *Galatea* being to blame for executing the manœuvre of turning, in order to anchor

in the Thames, without giving the danger signal prescribed by art. 18 of the Thames Bye-laws, 1887 (1), and also (being 175 feet long) for failing, as soon as she came to anchor, to duly exhibit the second riding light prescribed by art. 7 (*c*) of the Bye-laws, 1892. (2)

Sir Walter Phillimore, and *Dawson Miller*, for the plaintiffs, the owners of the *Galatea*.

Aspinall, Q.C., and *Stubbs*, for the defendants, the owners of the *Wega*.

[The cases of *The New Pelton* (3), *The Philotaxe* (4), and, on the question of pilotage, *The Vesta* (5) were referred to.]

Cur. adv. vult.

Feb. 21. BRUCE J. The *Galatea*, shortly before the collision, was proceeding up Barking Reach when, her master says, he suddenly got into a dense fog and he decided to anchor for safety. The tide was about the last hour flood flowing about half a knot an hour. His engines were stopped and his helm

(1) Bye-law of the Conservators of the River Thames approved by Order in Council, December 29, 1887, and applying to the River Thames from Yantlet Creek to Teddington :—

"Steam whistle signals . . . art. 18.

"When a steam vessel is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds' duration."

(2) Bye-law approved by Order in Council, August 5, 1892 :—

Art. 7 (*c*): "Every vessel of the length of 150 feet or more lying in the river at her own anchor or at mooring buoys where she will swing shall in lieu of the riding light carry in the forward part of the vessel at a height of not less than twenty feet and not exceeding forty feet above the hull a white light in a globular lantern of not less than eight inches in diameter and so constructed as to shew a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile on a dark night with a clear atmosphere: and at or near the stern of the vessel and at such a height that it shall not be less than fifteen feet lower than the forward light another such light."

"For the purposes of this bye-law the length of a vessel shall be deemed to be the length appearing in her certificate of registry."

(3) [1891] P. 258.

(4) 3 Asp. M. L. C. 512.

(5) 7 P. D. 240.

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put hard-a-port to give the vessel an angle across the river. Then the engines were put slow ahead and then full speed astern, in order to take the way off his ship, and when the way was taken off his ship he let go his anchor. He had ascertained by sounding that he was in four fathoms, and he ordered the mate to give the ship fifteen fathoms of chain. He then got a hail from the mate that the anchor was holding, and he then, according to his own account, gave an order to have the two side lights and the masthead light taken in and the riding light put up, and he saw this order carried out.

The *Wega* was coming down the Reach, and those on board her say that they saw the masthead light and red light of the *Galatea* about half a mile off nearly ahead, but a little on the port bow of the *Wega*. The pilot, who was in charge of the *Wega*, says that he took the *Galatea* to be a vessel coming up the river, and he ported so as to get into a position to pass her port side to port side. Suddenly the red light of the *Galatea* disappeared and a riding light appeared on the *Galatea*, and those on board the *Wega* saw that the *Galatea* was lying athwart the river. The engines of the *Wega* were put full speed astern and her helm hard-a-port, but the port quarter of the *Galatea* and the stem of the *Wega* came into collision.

The first question to be considered is: Was the *Wega* to blame. Had she a proper look-out? It seems to be an admitted fact in the case that immediately after the *Galatea* anchored, or almost at the moment she anchored, the fog lifted.

The case of the *Galatea*, according to her preliminary act, is, that she saw the *Wega* about a mile off; and the case of the *Wega*, according to her preliminary act, is, that she saw the *Galatea* about half a mile off.

I think that these distances are exaggerated; but the statements made on the one side and the other are sufficient to shew that the fog had, at least to a great extent, cleared off. Those on board the *Wega* say that they saw the red light of the *Galatea* from a quarter to half a mile away.

I am asked to disbelieve this statement and to regard it as a mere excuse made by the *Wega* for porting her helm. But I cannot in this way summarily set aside the positive evidence of

the pilot, the master, the chief officer, and the second mate of the *Wega*.

It is quite true that questions of fact are not to be determined by the number of witnesses on the one side or the other; but I cannot help coming to the conclusion that the probabilities of the case favour the statement of the witnesses for the *Wega*. I cannot doubt that the *Wega* ported, and, if she saw a red light, to port her helm was the natural manœuvre for her to adopt. The *Galatea* brought up to the south of mid-channel, and it is difficult to understand why the *Wega* should have attempted to pass to the south of the *Galatea* unless the red light of the *Galatea* was visible. But the whole question is a question of time.

At the time the anchor of the *Galatea* was let go the red light was properly exhibited. Was it taken in with due expedition? If the statement of the witnesses from the *Wega* is correct, it is hardly possible to avoid the conclusion that the red light was not taken in as soon as it might have been and should have been. One of the witnesses from the *Galatea* said that the red light of the *Wega* was first seen by him five or six minutes after the side lights and masthead light were taken in, and several of the witnesses from the *Galatea* gave evidence which would lead to the conclusion that an appreciable or even a considerable time elapsed between the lights of the *Galatea* being taken in and the lights of the *Wega* coming into sight. But there is no matter upon which witnesses are so likely to be mistaken as a question of time; and I have come to the conclusion on the evidence that the red light of the *Galatea* was left exhibited after the *Galatea* came to anchor, not perhaps for a long time, but for a sufficient time to mislead the *Wega*. If the red light was left exhibited for a period of two minutes or even less after the *Galatea* was brought up, I think it would be enough to lead to the mischief which happened. The red light ought to have been taken in immediately the *Galatea* was brought up. I do not think that was done. There was a lapse of two or three or four minutes or more between the time when the ships sighted each other and the collision. According to the witnesses from the *Galatea*, the red light was taken in just at the time the

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anchor light was put up. The man who put up the riding light says that he got the riding light up and went back to the forecastle. Before he got back to the forecastle the *Wega* was within hailing distance, and he heard the hailing. His evidence, I think, tends to confirm the statement of the *Wega* that the side lights of the *Galatea* were not taken in until the *Wega* was very close upon her.

I have come to the conclusion that the *Wega* is not to blame. She was embarrassed by seeing the red light, and in the circumstances I do not think she was to blame for porting. She could not have ported more than she did because of the barges on her starboard bow.

As soon as the *Wega* found that the *Galatea* was nearly athwart and at anchor, she at once adopted the only possible measures to avoid collision. I think a good look-out was being kept on board the *Wega*, and that she was carefully navigated and at a proper rate of speed taking the state of the weather into consideration, and that therefore no blame attaches to her.

It follows from what I have already said that I think the *Galatea* is to blame for allowing her red light to be exhibited for an appreciable time after she came to anchor. The execution of the manœuvre of anchoring in a river like the Thames, in a fog or in thick weather or at night, is an operation which requires to be performed with very great care. When the *Galatea* threw herself athwart the river she ought to have been astute in the adoption of all precautions to minimize the danger. The side lights ought to have been taken in instantly she was held by her anchor. I think there was delay in carrying out this duty. Moreover, I think that the *Galatea* is to blame for neglecting to sound the signals required by art. 18 of the Thames Conservancy Regulations. It has been contended that the article applies only where a vessel is turning round, in the sense of going round from one course to the opposite course. [The learned judge read the bye-law, and continued:—]

I think that a vessel throwing herself athwart the river and stopping her way to come to anchor is "not under command" within the meaning of the rule, and that it was incumbent upon the *Galatea* to have sounded four or more blasts in rapid succes-

sion. It is said that the *Galatea* did sound three short blasts as she was reversing before she let go her anchor. I am not quite satisfied upon the evidence that she did; but even if she did, three short blasts do not constitute the appropriate signal to signify that a vessel is throwing herself athwart a navigable channel.

It is said that the *Wega* did not hear the three short blasts, and that, therefore, it is not to be assumed that she would have heard four or more. But I cannot assent to that argument. Four blasts or more constitute a danger signal which is calculated to attract attention, and, as I read the rule, it requires not merely four blasts to be sounded, but four or *more*, which I think is to be taken to mean that the blasts shall be more than four where the danger is such as to require it. And I cannot doubt in the present case that if the *Galatea* had sounded four short blasts or more so long as the danger lasted that a warning would have been given which probably would have enabled the *Wega* to avoid the collision.

It is contended that as the *Galatea* was at anchor before the collision the circumstances which made it incumbent upon her to sound the danger signal had passed. But the danger cannot, I think, be said to have passed until the *Galatea* had swung to her anchor. The Elder Brethren consider that in the state of the tide the *Galatea* would, in a little time, have swung to tide head down the river, and so long as she was swinging across the river, so long, as it seems to me, did the danger occasioned by her turning continue.

Again, I think that the *Galatea* is to blame for not having near her stern a second riding light exhibited so as to shew an unbroken light all round the horizon in accordance with art. 7 (*c*) of the Thames Conservancy Regulations, allowed by Order in Council of August 5, 1892.

According to the evidence adduced on behalf of the *Galatea*, she had a masthead light, shewing a light over twenty points, exhibited on her stern or taffrail. Whether this light was exhibited is a question on which there is great conflict of evidence. But if she had such a light exhibited it would give very uncertain warning to a vessel coming down the river.

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Until the *Galatea* was nearly athwart the river, it would not shew up the river at all, and even then the extent to which it would shew would depend to a considerable degree upon the position in which it was fixed or hung. Whether there was a stern light exhibited from the stern of the *Galatea* or not, it was not a light of such a character as to attract the attention of vessels coming down the river at a distance of a mile, or anything like that distance.

I think it was the duty of the *Galatea*, as soon as she came to anchor, to exhibit a second riding light near her stern, as prescribed by the regulations I have referred to. I think it was specially incumbent upon her, having regard to the position in which she was, that she should be careful to comply with this regulation in order to afford notice to vessels coming up or down that she was athwart, or nearly athwart, the channel, and I think it is highly probable that if a bright riding light had been exhibited near the stern of the *Galatea* it would have been seen by the *Wega* at a distance sufficient to have enabled the *Wega* to have kept out of the way of the *Galatea*.

I pronounce the *Galatea* alone to blame.

Solicitors for the plaintiffs, the owners of the *Galatea*: *William A. Crump & Son.*

Solicitors for the defendants, the owners of the *Wega*: *Stokes, Saunders, & Stokes.*

T. L. M.

ROYLE & Others *v.* HARRIS & Others. 1895

Feb. 21; *March* 1.

Probate—Practice—Will—Position of Signature of Testator—"At the foot or end thereof"—"Opposite to the end of the Will"—Wills Act Amendment Act, 1852 (15 *&* 16 *Vict. c.* 24), *s.* 1.

A testamentary document consisted of a sheet of paper containing on the first page a lithographed form of will. The form in the first page was filled in by the testatrix, and contained bequests to "my sisters and friends." Her signature and those of the attesting witnesses were at the bottom of the first page. The second and third pages contained a list of bequests to persons, some of whom were the sisters and others friends of the testatrix. There was no direct evidence that the second and third pages had been written before the execution of the will:—

Held, that, assuming the second and third pages to have been written before the execution of the will, the signature of the testatrix was not so placed "opposite to" the writing contained in these pages as to bring the case within s. 1 of the Wills Act Amendment Act, 1852, and that, therefore, the first page alone could be admitted to probate.

In the Goods of Wotton (Law Rep. 3 P. & D. 159) explained.

By their statement of claim the plaintiffs, who were sisters and three of the next of kin of Sarah Akeroyd, claimed a grant of administration of her personal estate, with the first page of a testamentary paper annexed, or, in the alternative, in the event of the Court being of opinion that such paper contained no valid disposition of property, a general grant of administration. By their counter-claim, the defendants, three friends of the deceased, whose names were mentioned as legatees in the second and third pages, claimed that the whole testamentary paper constituted the will of the testatrix, and that administration should be granted to such person or persons as the Court might direct, with the whole testamentary paper annexed.

The first page contained a lithographed form of will, filled in in the handwriting of the testatrix, and was as follows: "This is the last Will and Testament of me *Sarah Akeroyd* (1), wife of *John Akeroyd* of *Brixton London*. Whereas I am possessed as my separate property, independently of my said husband, of certain personal estate, namely *Money Furniture House Linen Wearing Apparel and Jewellery* which I am entitled to dispose of by will Now in exercise of the said power vested in me I

(1) The words in italics were in the handwriting of the testatrix.

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hereby dispose of the same in the following manner, that is to say, I give and bequeath unto *my sisters and friends* to and for *their* own use absolutely and I nominate constitute appoint . . . . to be executors of this my will and hereby revoking all former or other wills made by me at any time heretofore I declare this to be my last will and testament. In witness whereof I the said *Sarah Akeroyd* have to this my last will and testament set my hand the day of in the year of Our Lord One thousand eight hundred and .

Signed by the testatrix . . . in the presence of us present at the same time who have thereunto subscribed our names as witnesses in the presence of the said testatrix and of each other. *Sarah Akeroyd*

Maurice Oram

Sarah Ann Brickley."

The second and third pages contained a list in the handwriting of the testatrix of legacies of "money, furniture, house linen, wearing apparel and jewellery" to the three plaintiffs, the three defendants, another sister, and some other friends.

Neither of the attesting witnesses recollected seeing the second and third pages; there was no direct evidence that any part of them was written before the execution of the will; and it was admitted at the trial that a part of each was not written before the execution of the will.

Searle, for the plaintiffs. The grant should be limited to the first page of the instrument. That page constitutes a will "signed at the foot or end thereof" by the testatrix, within the meaning of s. 1 of the Wills Act Amendment Act, 1852. (1) The second and third pages "are underneath or follow" the

(1) By the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1: "Where" by 1 Vict. c. 26 "it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall

signature, and are of no effect. *Sweetland* v. *Sweetland* (1), *In the Goods of Dilkes* (2), *Margary* v. *Robinson* (3), *Phipps* v. *Hale* (4), and *In the Goods of Hughes* (5), shew that there must be an attested signature at the real end of the will; and here the first page does not incorporate the second and third pages. In *In the Goods of Wotton* (6) the first page, that which was signed, was really the end of the will, which began on the second page.

Bayford, Q.C, and *Hextall,* for the defendants. The first page of the instrument was clearly not intended to be in itself the will of the testatrix. The second and third pages contain particulars of the bequests made in the first page; those parts of the pages, which were written before the execution of the will, should be included in the grant. The cases of *In the Goods of Coombs* (7) and *In the Goods of Wotton* (6) are sufficient authority for the proposition that, under the circumstances, the signature, though on the first page, may be regarded as "opposite to the end of the will," within the meaning of the section.

Cur. adv. vult.

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be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

(1) 4 Sw. & Tr. 6.
(2) Law Rep. 3 P. & D. 164.
(3) 12 P. D. 8.
(4) Law Rep. 3 P. & D. 166.
(5) 12 P. D. 107.
(6) Law Rep. 3 P. & D. 159.
(7) Law Rep. 1 P. & D. 302.

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SIR F. JEUNE, PRESIDENT. In this case, there is produced a lithographed form of will on the first of four pages of foolscap paper. The form, as filled up in the handwriting of the testatrix, has the usual commencement of a will, with the name of the testatrix mentioned, and bequeaths several enumerated kinds of property to "my sisters and friends." It does not appoint any executors, but the lithographed words revoke former wills. At the bottom of this page, (I shall speak of it as the first page, and the two others with writing on them as the second and third,) there are the signature of the testatrix, Sarah Akeroyd, and the signatures of the witnesses opposite the testimonium clause. One of the witnesses proved the due execution of this document, but knew nothing of any writing on the pages of the document other than the first. It was admitted that the other attesting witness could prove no more. In fact, however, on the second and third pages of the document there is a list of bequests in the handwriting of the testatrix to persons, some of whom were the sisters and the others friends of the testatrix. At the very top of the second page is one of these bequests in these terms, "My sister, Emily Durrant, 200*l.*, or equally divided between her surviving children," and other gifts follow in terms of similar character.

Assuming, for the moment, that the second and third pages were written before the execution of the will of the testatrix, the question is whether their contents can be admitted to probate. It is clear, I think, that they cannot be treated as incorporated, or as interlineations, such, for example, as were admitted to probate in the case of *In the Goods of Birt* (1), because there is nothing on the face of the first page referring to them. Nor do I think it possible to contend that the signature is so placed "opposite to" the writing on the second and third pages as to bring the case within the language of s. 1 of the Wills Act Amendment Act, 1852.

The appearance of the place of the signature in relation to the contents of the document in this case is very different from that in the case of *In the Goods of Coombs.* (2) I have looked at that will, and the signatures of the testator and witnesses, which are

(1) Law Rep. 2 P. & D. 214. (2) Law Rep. 1 P. & D. 302.

written across the second page and opposite the third, on which there is no space available for signatures, make it apparent, on the face of the will, that the testator "intended to give effect by such his signature to the writing signed as his will."

But it is suggested that, as in the case of *In the Goods of Wotton* (1), the will may be considered to begin with what I have called the second and third pages, and to end with what I have called the first page, so that the dispositions on the second and third pages are not "underneath," and do not "follow" the signature, within the meaning of the section.

There are, no doubt, points of similarity between the document in this case and the document in the case of *In the Goods of Wotton.* (1) (2) In both instances there is a lithographed form partly filled up, with a properly attested signature at its foot on the first page, and the substance of the disposition on the second and third pages. But there is a marked difference in the form of the document in that case and this, as well as a difference in the evidence. In the case of *In the Goods of Wotton* (1) the second page begins with the ordinary commencement of a will, including the name and description of the testatrix, and the language which follows is that of a complete disposition of the property. The lithographed form on the first page, on the other hand, is not filled up with the name of the testatrix, so that it is a less natural commencement of the will than the second page. The second and third pages could not possibly have been intended to be inserted in the body of the first; they form with the first a consecutive document, and so considered can hardly fail to be deemed the real commencement of the will. Further, the affidavit of one of the subscribing witnesses contains the following passage: "And further referring to the said will, and particularly observing that the same has been written on a printed form, and that the signatures of the said testatrix and of the subscribing witnesses as aforesaid are placed and subscribed at the end of what is apparently the first page of the said will and not at the foot or end thereof, And further referring to the

(1) Law Rep. 3 P. & D. 159.

(2) The learned President had examined the will in question.

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words written on what are apparently the second and third pages of the paper on which the said will is written, the same beginning thus, 'This is the last will of Elizabeth Wotton, inmate of the Friendly Female Asylum, Gloucester Place, Albany Road, Camberwell; I bequeath to my relation, to my nephew Samuel Wotton;' and ending thus, 'to be sold to help pay expenses of which, a sofa, round table, a night ditto, washhand-stand, carpets, coal tub, coal scuttle, old deal table with two drawers, two white blinds,' I further make oath and say that the whole of such words comprised on such two sides were written thereon previously to the execution of the said will by the said deceased as aforesaid, and I verily believe and in my conscience am perfectly certain that the said deceased intended her said will to begin at the top of the said second side as aforesaid, and that, in signing the same, as above deposed, she considered the printed form as in effect the conclusion and attestation to her said will, and disregarded the printed endorsement thereon as of no consequence, and that she intended her said signature to the said will to be at the foot or end thereof, and in due and final execution of the same." It may be that the statement of belief of this witness is not strictly evidence, but it is at any rate clear that the second and third pages were in fact written before the execution of will, and, looking at the whole frame of the document, the inference is irresistible that they were written before the first page and intended to be the commencement of the will.

I should be glad if in this case I could come to a conclusion similar to that reached *In the Goods of Wotton* (1); but I cannot do so. I have no doubt that the fact is that the words on the second and third pages were not intended to commence the will, but were, whenever they were written, intended to expand and explain the bequest to "my sisters and friends" on the first page. Very probably they were written where they are because there was insufficient room for them after the words "my sisters and friends" on the first page.

I have assumed that the second and third pages were, in fact, written before the execution of the will. There is no direct evidence that they were, and I should, for several reasons, have

(1) Law Rep. 3 P. & D. 159.

found the question not easy to decide. But in the above view it is not necessary to consider it.

The result is that the second and third pages cannot be admitted to probate, but the first, I think, can. This is not a case such as *Margary* v. *Robinson* (1), where two crosses placed by a blunder in the middle of a document were held not to constitute an execution of any part of it, nor a case such as *Sweetland* v. *Sweetland* (2), *Phipps* v. *Hale* (3), or *In the Goods of Dilkes* (4), where signatures in the earlier parts of a document were considered to be signatures of authentication and not of execution. So far as it goes, the first page of the document in this case constitutes a properly executed will.

I pronounce, therefore, in favour of the will as contained in the first page of the document in question, costs of all parties to come out of the estate.

Solicitor for the plaintiffs: *John Hands, for Smith & Atkinson, Folkestone.*

Solicitor for the defendants: *John Greenfield.*

(1) 12 P. D. 8.
(2) 4 Sw. & Tr. 6.
(3) Law Rep. 3 P. & D. 166.
(4) Law Rep. 3 P. & D. 164.

H. D. W.

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Jan. 26; Feb. 4.

THE WINESTEAD.

Admiralty—Collision—Compulsory Pilotage—Coasting Trade—Foreign-going Ship—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 376, 379—*Order in Council, Dec.* 21, 1871—*Customs Consolidation Act*, 1876 (39 & 40 *Vict. c.* 36), *ss.* 129, 144, 145—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict. c.* 21), *s.* 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 625.

The defendants' steamship made regular voyages from London with part of her cargo and ballast to Cardiff, or other port in the Bristol Channel, where she discharged her ballast, took in the remainder of her cargo, and proceeded to Venice, or other Mediterranean ports, and returned to London.

On the voyage in question she was proceeding down the Thames, within the London district, in charge of a Trinity House pilot, when she came into collision with the plaintiffs' barge in tow of a tug, and both vessels were held to blame; but the fault, so far as the steamship was concerned, was that of the pilot alone:—

Held, by Bruce J., that the defendants were not liable, as, following *The Agricola* (2 Wm. Rob. 10), and *The Lloyds or Sea Queen* (Br. & L. 359), the steamship was a foreign-going ship, not within any of the exemptions in the Merchant Shipping Act, 1854, and, therefore, the employment of the pilot was compulsory.

Courtney v. *Cole* (19 Q. B. D. 447) distinguished.

ACTION of damage by collision. The plaintiffs were the owners of the dumb barge *Annie*, and the owners of her cargo. The defendants were the owners of the steamship *Winestead*.

The facts, so far as material on the question of the defendants' plea of compulsory pilotage, were shortly as follows:—

On June 24, 1894, about 5 A.M., a collision occurred, in Limehouse Reach of the River Thames, between the *Annie*, which, with five other barges, was being towed by a tug from Tilbury Docks to London, and the *Winestead*, a screw steamship of 1363 tons net, and 1673 tons gross, register, belonging to the port of Hull, with twenty-two hands, and on a voyage from London to Venice viâ Cardiff, laden with a general cargo and ballast, the ballast to be discharged at Cardiff and replaced by coals.

The plaintiffs, by their statement of claim, alleged that the collision—the result of which was to break the *Annie* adrift and sink her—was solely caused by the negligent navigation of the

Winestead by the defendants or their servants. The defendants, by paragraph 10 of their defence, alleged that "if the said collision was caused or contributed to by the negligent navigation of the *Winestead*, which the defendants deny, they say that at the time in question the *Winestead* was in charge of a duly qualified pilot by compulsion of law, and that, if the said collision was caused or contributed to by the negligence of any person on board the *Winestead*, such negligence was that of the said pilot, and not of the defendants or their servants."

The plaintiffs joined issue, and on December 10, 11, 12, 1894, the action was tried by Bruce J., assisted by two of the Elder Brethren of the Trinity House. On December 13 the learned judge found that the collision was caused by the wrongful navigation of the tug towing the *Annie*, and of the *Winestead*, and pronounced both to blame; but so far as the *Winestead* was concerned, there was no negligence on the part of her officers or crew, the fault being that of the pilot alone.

The point of law, whether the pilot, who was admitted to be duly qualified, was compulsorily in charge at the time of the collision, was reserved and argued on January 26, when it was contended on behalf of the owners of the *Winestead* that the decisions of Dr. Lushington in *The Agricola* (1) and *The Lloyds or Sea Queen* (2) were conclusive in shewing that the vessel was in charge of the pilot by compulsion of law.

It was contended, on behalf of the owners of the *Annie*, that the *Winestead* was exempt from compulsory pilotage as being employed in the coasting trade of the United Kingdom, within the meaning of sub-s. 1 of s. 379 of the Merchant Shipping Act, 1854, and that the cases of *The Agricola* (1) and *The Lloyds or Sea Queen* (2) were decided before, and were inconsistent with, ss. 140, 141, of the Customs Consolidation Act, 1876, and were, in effect, overruled by *Courtney* v. *Cole* (3), or, at any rate, that the *Winestead* was exempt as being a vessel trading to a place in Europe north of Boulogne, within sub-s. 3 of s. 1 of the same statute. (4)

(1) 2 Wm. Rob. 10.
(2) Br. & L. 359.
(3) 19 Q. B. D. 447.
(4) 17 & 18 Vict. c. 104:—
Sect. 379: "The following ships, when not carrying passengers, shall

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Aspinall, Q.C., and *Butler Aspinall*, for the defendants, the owners of the *Winestead*, in support of the plea of compulsory pilotage.

Sir Walter Phillimore, and *F. Laing*, for the plaintiffs, the owners of the *Annie*.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned, *Mersey Docks and Harbour Board* v. *Henderson* (1) was cited.

Cur. adv. vult.

Feb. 4. BRUCE J. The question now arises whether the owners of the *Winestead* are to be relieved of their liability in damages to the owners of the *Annie* by reason of the employment of the pilot being compulsory upon them.

For some twelve months before the collision the *Winestead* had been engaged in trading between London, the Bristol Channel, and Venice. In the ordinary course of her trade she took in some cargo at London for Venice, and such ballast as was necessary to put her into good trim. She then sailed to Cardiff, or some other port in the Bristol Channel, there discharged her ballast and completed her cargo, and then sailed for Venice. At Venice she discharged her cargo, and then returned to London. The *Winestead* was in the prosecution of a voyage of this character at the time of the collision.

Before sailing from London the vessel paid the light dues on

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be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; that is to say:

(1.) Ships employed in the coasting trade of the United Kingdom. . . .

(3.) Ships trading to Boulogne or to any place in Europe north of Boulogne."

Modified by Order in Council, December 21, 1871, as follows:—

"All ships trading from any port or place in Great Britain, within the London district, or any of the Trinity House outport districts, to the port of Brest, in France, or any port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from Brest or any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any port or place in Great Britain within either of the said districts, when not carrying passengers, shall be exempted from compulsory pilotage within such districts."

This Order in Council is now embodied in s. 625, sub-ss. 3, 4, of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(1) 19 Q. B. D. 123, at pp. 129, 130; 13 App. Cas. 595.

a voyage from London to Venice viâ Cardiff, had her victualling bill examined, and obtained a clearance label in London, although in accordance with the terms of s. 129 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), a final clearance label was obtained at Cardiff. The master of the vessel kept no cargo-book, and obtained no transire, as required in the case of vessels engaged in the coasting trade, in accordance with the provisions of ss. 144 and 145 of the last-mentioned statute, as amended by s. 9 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21).

The master of the vessel was compelled to employ a pilot, by virtue of s. 376 of the Merchant Shipping Act, 1854, unless his ship fell within the exemptions contained in s. 379 of the same statute, or in the Order in Council of December 21, 1871.

It was contended by counsel for the plaintiffs that the *Winestead* was a ship employed in the coasting trade of the United Kingdom, and so fell within the first exemption contained in s. 379 above referred to. I think that the ship was employed in trading between London, Cardiff, and Venice, and that she was a foreign-going ship, within the meaning of the interpretation clause (s. 2) of the Merchant Shipping Act, 1854, and I do not think that a ship, while she is engaged in foreign trade, carrying goods which are destined for a foreign port, can be treated as employed in the coasting trade, within the meaning of sub-s. 1 of s. 379 of the Merchant Shipping Act, 1854. The Customs Consolidation Act, 1876, s. 142, enacts that "no goods shall be carried in any coasting ship, except such as shall be laden to be carried coastwise at some port or place in the United Kingdom, and . . . if any coasting ship shall touch at any place over the sea . . . unless forced by unavoidable circumstances . . . the master of such ship shall forfeit 100*l*."

It may be said that the Customs Consolidation Acts are not part of the Merchant Shipping Acts; but the two series of Acts relate, to a large extent, to the same subject-matter, and I do not think that the legislature can have contemplated that the phrase "coasting ship," in the Customs Consolidation Act, should have a different meaning from the words "ships employed in the coasting trade," used in the Merchant Shipping Act, 1854. I think that the words "ships employed in the coasting trade"

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are used in contradistinction to ships employed in foreign trade, and that "employed in the coasting trade" means, employed for the time, at least, only in the coasting trade, and not in foreign trade. A ship which loads cargo at a port in England for a foreign port, and sails with that cargo to a foreign port, cannot, I consider, be said to become a coaster merely because, in the course of her voyage to the foreign port, she touches at an English port to discharge ballast and complete her cargo. But, apart from my own view of the meaning of the statute, I am bound by the decisions of Dr. Lushington in *The Agricola* (1) and in *The Lloyds or Sea Queen.* (2)

In *The Agricola* (1) the ship had made a voyage from Calcutta to London, and she had discharged all her cargo there, and then proceeded from London to Liverpool in ballast. There were therefore some grounds for contending that the voyage from London to Liverpool was a new and distinct voyage; yet Dr. Lushington held that the ship, when in the prosecution of the voyage from London to Liverpool, was not employed on a coasting voyage, because, in the ordinary course of her trade, she was engaged in trading from Rio Janeiro and Calcutta and other foreign ports to London and Liverpool. In *The Lloyds* (2) the ship was, at the time in question, in the course of a voyage from Liverpool to London with a cargo shipped at Liverpool to be delivered in London. Yet because the ship was ordinarily engaged in foreign trade, Dr. Lushington held that the ship was not employed in the coasting trade. These decisions—one given in the year 1843, and the other in the year 1863—have never been overruled, and they lay down a principle which far more than covers my decision in the present case.

In the present case it is not necessary for me to decide more than this—that a vessel while engaged in carrying cargo destined to a foreign port is not within the words of the exemption, "ships employed in the coasting trade," even though she may in the course of her voyage to the foreign port proceed from one English port to another.

It was said in argument that the decisions of Dr. Lushington in the cases mentioned had been impugned by the Court of Queen's Bench in *Courtney* v. *Cole* (3); but that case was decided

(1) 2 Wm. Rob. 10. (2) Br. & L. 359. (3) 19 Q. B. D. 447.

upon another exemption—namely, the third exemption contained in s. 379 of the Merchant Shipping Act, 1854, as extended by the Order in Council to which I have referred. And both the learned judges who decided that case were careful to point out that their decision was not in conflict with the decisions of Dr. Lushington in *The Agricola* (1) and *The Lloyds.* (2)

Then it was contended that the *Winestead*, if not within the first exemption, was within the third, and that she was a ship trading to Cardiff, and that Cardiff was a place in Europe north and east of Brest. But, in my opinion, *Europe* is used, in the exemption in the Merchant Shipping Act, in contradistinction to the *United Kingdom.* If Europe were used in the third exemption, as including Great Britain, there would be little meaning in the first exemption, because there are few ports in England that are not north and east of Brest. The Order in Council of December 21, 1871, clearly puts this interpretation upon the statute, because it exempts ships trading from any port in Great Britain to any port in Europe north and east of Brest, and from any port in Europe to any port or place in Great Britain. It may be said that the Order in Council, although it may extend the exemptions in the Merchant Shipping Act, cannot limit them, and that it ought not to be referred to as an authority for placing a limitation upon the words of the exemption in the statute. But, in my view, the Order in Council does not limit the meaning of the words in the Act. I only refer to it as confirming the interpretation which, without the Order in Council, I should have put upon the words of the Act.

I have come to the conclusion, for the reasons I have given, that the *Winestead* was not within any of the exemptions in the Merchant Shipping Act, 1854, and that the employment of the pilot was compulsory upon her master.

Plea of compulsory pilotage upheld; judgment for defendants; no costs.

Solicitors for plaintiffs: *Keene, Marsland, Bryden, & Besant.*
Solicitors for defendants: *Rollit & Sons.*

(1) 2 Wm. Rob. 10. (2) Br. & L. 359.

T. L. M.

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March 13, 14.

[IN THE COURT OF APPEAL.]

THE GIPSY QUEEN.

Admiralty—Salvage—Practice of Court of Appeal—Amount of Award reduced—Apportionment—Costs.

On appeals in salvage cases it is a general but not a hard and fast rule of practice that costs will not be given to an appellant who succeeds in reducing the amount of the salvage award.

There is not any fixed rule as to apportioning the amount of the award.

APPEAL by defendants, the owners of the steamship *Gipsy Queen*, her cargo and freight, against an award of Bruce J. in a salvage action brought by the plaintiffs, the owners, master, and crew of the steamship *Jane Clark*.

The case is reported only on the question of the practice as to apportionment and costs.

The *Gipsy Queen*, an iron screw steamship of 667 tons gross, and 413 tons net, register, whilst on a voyage from Gothenburg to West Hartlepool with a cargo of wood and iron, a crew of seventeen hands, and some passengers, became disabled in the North Sea, and on October 1 and 2, 1894, was towed about 250 miles to her destination by the *Jane Clark*, a screw steamship of 803 tons gross and 495 tons net register, from Borgo to Seville with a cargo of boards, and a crew of thirteen hands. The values were: *Gipsy Queen*, 3000*l.*; cargo, 2096*l.*; net freight, 147*l.*; total, 5243*l.* *Jane Clark*, 7500*l.*; cargo, 2095*l.*; freight, 600*l.*; total, 10,195*l.* On February 6 the case was heard by Bruce J., assisted by two of the Elder Brethren of the Trinity House, and the learned judge awarded the sum of 1200*l.*, with costs, and apportioned it as follows: to the owners of the *Jane Clark*, 900*l.*; to the master, 75*l.*; to the crew, 225*l.*, according to their rating.

On appeal:—

March 13. *Raikes, Q.C.*, and *Lauriston Batten*, for the owners of the *Gipsy Queen*, her cargo and freight, contended that the amount of the award was excessive considering the nature of the services and the values at risk.

Sir Walter Phillimore, and *Butler Aspinall*, for the owners, master, and crew of the *Jane Clark*.

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THE COURT (Lord Esher M.R., Lopes and Rigby L.JJ.), after consultation with the assessors on the nautical questions involved, reduced the award to 800*l.*

Sir Walter Phillimore, on behalf of the salvors, asked the Court to apportion, and suggested that the rule now adopted in the Admiralty Division, when success was mainly due to the steam-power of the salving vessel, and there were no exceptional circumstances or special services rendered by any separate portion of the crew, was to give three-fourths to the owners, one-third of the remaining one-fourth to the master, and the remaining two-thirds to the crew according to their rating.

LORD ESHER M.R. That may be a very good working principle; but there is no such rule. The apportionment must in each case depend upon the particular circumstances.

[The Court apportioned the sum of 800*l.* as follows: 620*l.* to the owners, 50*l.* to the master, and 130*l.* to the crew according to their rating.]

Sir Walter Phillimore submitted that, in accordance with the practice of the Privy Council, which this Court followed, the successful appellants were not entitled to costs.

Raikes, Q.C., contra.

[LOPES L.J. referred to *The City of Berlin* (1), where the award was increased, and James L.J. said: "I see no reason why salvage cases should form any exception to the general rule adopted under the Judicature Act that a successful appellant is entitled to his costs of the appeal."]

Cur. adv. vult.

March 14. LORD ESHER M.R. We have considered the question as to the costs, and we think that the practice of this Court is, in a case of salvage where the amount of the award is reduced,

(1) 2 P. D. 187, at p. 188.

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to give no costs. This is not a hard and fast rule to be observed in all cases, but is a general rule of practice. (1)

Award reduced from 1200*l.* *to* 800*l.*; *no costs of the appeal.*

Solicitors for appellants (defendants): *Pritchard & Sons.*

Solicitors for respondents (plaintiffs): *Crossman & Prichard, for H. W. Bell, West Hartlepool.*

T. L. M.

1895 *Feb.* 1.

[IN THE CONSISTORY COURT OF MANCHESTER.]

THE VICAR AND CHURCHWARDENS OF ST. JOHN, PENDLEBURY *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—Reredos—Triptych with Painted Panels surmounted by Figures of Our Lord and Moses and Elias.

The Chancellor of the diocese of Manchester decreed a faculty to issue for the erection in a parish church of that diocese of an oaken reredos about eight feet in height, in the form of a triptych with painted panels, of which panels the two side ones or wings, being hung to the centre panel by hinges, could be closed over it when divine service was not being performed; the centre panel to have painted thereon a representation of The Last Supper, and on the one wing to be represented in painting "The Agony in the Garden," and on the other "The Risen Christ with the Marys at the Tomb"; the reverse sides of the wings to be plain; the whole to be surmounted by a figure of Our Lord carved in plain oak eighteen inches high, between figures of Moses and Elias of the same height beneath pillared canopies connected by an arch of tracery work over the central figure, and flanked by angels. The faculty so decreed to be issued was required to contain a proviso that the triptych was always to remain open during the performance of divine service.

THIS was a cause of faculty instituted on behalf of the Rev. William Llewellyn Octavius Noott, the vicar of the parish of St. John the Evangelist, Pendlebury, in the diocese of Manchester, and Lees Knowles and Charles D. Langley Greenhalgh, the churchwardens of the same, for the purpose of obtaining the

(1) For cases of appellants succeeding in reducing the salvage award, but not being allowed the costs of the appeal to the Privy Council, see *The Incæ* (1858) (12 Moo. P. C. 189, at p. 199); *The Chetah* (1868) (Law Rep. 2 P. C. 205, at p. 213); *The Amérique* (1874) (Law Rep. 6 P. C. 468, at p. 476); *The De Bay* (1883) (8 App. Cas. 559, at p. 567); *The Thomas Allen* (1886) (12 App. Cas. 118, at p. 121).

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grant of a faculty for the execution of certain proposed works in the church of the said parish; the particulars of such works specified in the application for faculty originally brought in by the applicants being, so far as material, as follows:—

"It is proposed to erect an oak reredos in the form of triptych. The central subject, the Last Supper. In the wings, the Agony in the Garden, the Risen Christ and the Marys at the Tomb. The whole surmounted by the figure of Our Lord with adoring angels. The Communion Table to be lowered one step—a marble floor and altar rails to be removed and new ones fixed."

1894. Nov. 30. On this day the suit came on for hearing before the Chancellor of the diocese of Manchester.

The applicants appeared in person, and gave evidence in support of the application.

No person appeared to oppose the grant of the faculty; but the chancellor being of opinion that, for the reasons subsequently more fully stated by him in the judgment, a faculty ought not to be granted in respect of so much of the design then before him as related to the figure of Our Lord by which it was proposed the reredos should be surmounted, adjourned the case and gave leave to the applicants to file in the registry particulars of an amended design of the proposed reredos not open to the same objections.

Subsequently the applicants filed the following amended particulars of the proposed reredos: "It is proposed to erect an oak reredos in the form of triptych with painted panels, the central subject the Last Supper. In the wings, the Agony in the Garden and the Risen Christ with the Marys at the Tomb. The reverse sides of the wings to be plain. The whole to be surmounted by a figure of Our Lord eighteen inches high, between figures of Moses and Elias of the same height beneath pillared canopies connected by an arch of tracery work over the central figure, and flanked by adoring angels."

1895. Feb. 1. The case was again called on. It appeared that the proposed reredos would be about eight feet high, and that the figures surmounting the same would be of about the same height as the painted figures in the panels of the triptych.

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Feb. 1. THE CHANCELLOR (P. V. SMITH, Esq.). In this case the vicar of the new parish of St. John the Evangelist, Pendlebury, and the churchwardens of the parish have applied for a faculty for the erection of a reredos and certain other alterations in their parish church. The cost of the work is proposed to be defrayed by the munificence of Mr. Lees Knowles, M.P., one of the churchwardens. As to the propriety in law of the alterations, other than the erection of the reredos, there can be no doubt; but a serious question of legality was raised by one particular in the design of the proposed reredos as originally submitted for the approval of the Court. The application described the intended structure as [THE CHANCELLOR read the description of the proposed reredos given in the particulars originally brought in to the registry]. It appeared that the subjects in the centre and wings were to be painted. The reredos itself was to be about eight feet high, and the surmounting figure of Our Lord was to be of plain oak, two feet in height, raised upon an open framework or stand one foot high from the top of the reredos. Its position would be in full relief against the central light of the east window, and nothing except the stand would connect it with the rest of the reredos. The description in the application conveyed the impression of its being intended to be in immediate juxtaposition with the wooden figures of adoring angels on each side. But this was not exactly correct; since the design shewed between it and them two figures, one on each side, intended to represent Moses and Elias. These, however, were to be much smaller than, and wholly subordinate to, the figure of Our Lord, and differed from it in being rendered less conspicuous by a covering of small canopies supported by pillars. The proposed surmounting figure of Our Lord was larger and more prominent in the design than any of the painted figures in the panels; and when the triptych was closed it would have been the only noticeable feature in the structure, since the reverse sides of the panels were to have no figures or pattern upon them. The parishioners were duly consulted as to the proposed reredos. At a meeting held last summer a resolution for its adoption was met by an amendment to the effect that the central figure be omitted. This amendment, however, was not seconded; and

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when the resolution was put the mover of the amendment was the sole dissentient. Neither he nor any one else has appeared in Court to oppose the faculty, and the design in all its details must, therefore, be taken to be approved by the parishioners.

That approval, however, does not relieve the Court from the duty of considering whether the intended structure is in all respects legal, and of exercising its discretion as to the grant or refusal of a faculty accordingly. In this respect the two component portions of the reredos stand upon a widely different footing. The legality of the compartments which form the triptych is not open to question, being entirely covered by the decision in the Exeter Reredos Case, *Phillpotts* v. *Boyd.* (1) But no similar direct authority can be adduced in support of the surmounting figures, and particularly that of Our Lord in the centre; and their legality or otherwise must be determined from the general principles laid down and illustrated by the judgment in that case and subsequent legal decisions. It is unnecessary to investigate the law on the subject as it existed or was understood before the Exeter Reredos Case, since the decision in that case imported into it a breadth and liberality which had not been previously recognised, but which has since been adhered to, and is not likely to be hereafter curtailed. From a comparison of the recent judgments on the subject, it appears that the sole test which now governs the legality or otherwise of figures in churches is whether or not they are free from the imputation or the risk of being abused by becoming the objects of adoration or superstitious reverence. Whether they are represented in stained glass, wood, or stone; whether they are painted, or in bas-relief, or completely formed; whether they are in groups, historical, or otherwise, or stand as independent statues—whatever be their position in the sacred edifice, and whatever may have been the intention or object in erecting them, they will all be tried by this one test, and by no other. If a figure in a stained glass window were to become the object of superstitious reverence, it would thereupon become unlawful, and a faculty would go for its removal: *Clifton* v. *Ridsdale.* (2) In the *St. Lawrence Pittington*

(1) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435.
(2) 1 P. D. 316, at p. 358.

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Case (1), in the Consistory Court of Durham, Chancellor Cowie considered that there would be a danger of the designed reredos being abused, and refused a faculty for it, although the figures were only intended to be painted, and were proposed with the simple intention of beautifying the church. It may be gathered from the judgments in the Folkestone Case (*Clifton* v. *Ridsdale* (2)), that the crucifix which was ordered to be removed from the chancel screen would not have been freed from liability to abuse, and so rendered legal, by being converted into a sort of historical group by having images at the base, like the ancient roods. At the same time, in the light of experience and common sense, all these circumstances which I have mentioned have a material bearing on the liability of any particular figure to abuse, and therefore on its legality. The offering of adoration or superstitious reverence to stained glass is practically unknown among Christians, and the risk of it is therefore inappreciable. But the same cannot be said of paintings and sculptures. If these are put up without regard to considerations of ornamentation, the presumption is that they are intended to become objects of superstition, and that this intention will be carried into effect. If, however, they are proposed simply as decorations, the Court must still be satisfied that they are not likely to be in fact abused. The figures in an historical group in a painting or panel are not regarded as liable to abuse, and, therefore, in the Denbigh Case (*Hughes* v. *Edwards* (3)), a panel consisting of the Saviour on the Cross surrounded by the figures of St. John and the Three Marys was held lawful immediately over the Holy Table, although a simple crucifix in the same position would be unquestionably illegal as liable to abuse.

When, however, we pass out of the category of historical groups, we come into uncertain and difficult ground. In the *St. Lawrence Pittington Case* (4) Chancellor Cowie says, in reference to the *Exeter Reredos Case* (5), "upon examining the judgment in order to ascertain how far the liberty in that case extends, I am unable, after a very careful consideration of it, together with

(1) 5 P. D. 131.
(2) 1 P. D. 316; 2 P. D. 276.
(3) 2 P. D. 361.
(4) 5 P. D. 131, at p. 134.
(5) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435.

the subsequent cases of *Clifton* v. *Ridsdale* (1) and *Hughes* v. *Edwards* (2), to find any direct sanction given by either to representations other than those of the kind described as sculptured or painted representations of portions of the sacred history, such as the Transfiguration, the Crucifixion, and the Ascension of Our Lord; the Descent of the Holy Ghost on the day of Pentecost; or the Gathering of the Manna, the Bearing of the Grapes of Eshcol, and the like. . . . Again, in *Phillpotts* v. *Boyd* (3), the Judicial Committee seem to have carefully avoided sanctioning representations of isolated figures, for they took pains to explain that the necessary separation of Our Lord from the gazing Apostles in the representation of the Ascension did not destroy the connected character of that representation. And, in *Hughes* v. *Edwards* (2) the present Dean of the Arches (who is also the judge of the Provincial Court of Appeal from this Court) apparently drew a distinction between a historical group and an isolated figure considered as a fitting decoration for a parish church." Chancellor Cowie accordingly refused a faculty for a painted reredos immediately above the Holy Table divided into three compartments, of which the centre was to represent Our Lord in Glory, seated as Divine King with crown, orb, and sceptre, His head encircled with a nimbus, His right hand elevated in the attitude of blessing, and His feet resting on a rainbow, while the side compartments were to contain representations of four saints, all turning in adoration towards the central figure. The judgment in that case, being that of a co-ordinate Court, is not binding on this Court, but it was referred to with approval by Lord Esher in the St. Paul's Reredos Case (*Reg.* v. *Bishop of London* (4)), and I entirely agree with it. At the same time, I do not regard either that or the preceding judgments as laying down that no isolated figure or unhistorical group of figures, whether painted or sculptured, can lawfully be set up in a church. This would introduce a further test of legality beyond the simple one of liability to abuse. I have accordingly in this Court sanctioned the erection of independent statues of saints in

(1) 1 P. D. 316; 2 P. D. 276.
(2) 2 P. D. 361.
(3) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435.
(4) 24 Q. B. D. 213 at p. 230.

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positions where it would be unreasonable to apprehend that they would become objects of adoration or superstitious reverence. But unquestionably such isolated figures or unhistorical groups require to be carefully scrutinised, as regards both their character and the position in which it is proposed that they shall be placed. It is obvious that representations of Our Lord are more likely to be abused than other figures, and that the danger of abuse is greater if they occupy a position immediately above the Holy Table or on the chancel screen than if they are placed elsewhere in the church.

Before applying the foregoing principles to any given case there is one further point to be borne in mind. While a distinction may conceivably be drawn between a cathedral and a parish church, no difference can be made between one parish church and another as to what is or is not lawful in them. Consequently, in deciding upon the legality of the proposed erection of a figure in a particular church, the Court must consider its probable effect upon the minds, not of the enlightened and well-educated persons who may happen to worship in that church, but of a weak and uninstructed congregation.

Coming now to the present application, I have been asked to grant a faculty for a reredos surmounted, not like the Exeter reredos, by an ornamental finial with an angel on each side, but by a figure of Our Lord two feet high, flanked on each side by a much smaller and independent figure, in addition to the angels which are to be found at Exeter. I feel no doubt that if it was proposed to place an isolated figure of the Saviour immediately above the Holy Table instead of the historical design of the Last Supper, I should be bound to withhold the sanction of the Court to it. Is then the case altered by the proposal to place such a figure above the compartments of the reredos at a distance of some four feet from the Holy Table? This depends, in my opinion, on the degree of prominence given to it. If the figure were merely of the nature of an ornamental finial in no way drawing off attention from or dividing attention with the scenes in the reredos below, I should regard it as not liable to abuse, and therefore as lawful. But this was not the case on the present application. In the design submitted to the Court the sur-

mounting figure of Our Lord was the most prominent feature in the whole structure; and when I expressed to the applicants the difficulty which I felt in granting a faculty for it, and suggested the substitution of an ornamental finial, they replied that to remove this figure would be to take the whole power out of the reredos. I am quite sure that the applicants, like those in the *St. Lawrence Pittington Case* (1), not only have no intention of introducing into their church a figure liable to be abused, but are convinced that there is no risk whatever of such abuse taking place in the case of this particular reredos and in this particular church. But the Court, in granting or withholding its sanction to the reredos in this instance, must be guided by general considerations and principles applicable to all parish churches alike, and to all similar cases; and I feel obliged to refuse a faculty for a reredos surmounted with the figure of Our Lord as originally proposed by the applicants, on the broad ground that a reredos is illegal in which the isolated figure of Our Saviour, whether upon the cross or not, forms a prominent feature in proximity to the Holy Table; since it is, in my opinion, a presumption of law that such a figure in such a situation involves a risk of abuse.

Since, however, the matter first came before the Court, the applicants have submitted an amended design, in which the surmounting figure of the Saviour is reduced to eighteen inches (being the same size as those of Moses and Elias on either side, and the painted figures in the panels), and woodwork tracery is carried over it, still further connecting it with the lateral figures and with the rest of the reredos. The change is slight; but it is, in my judgment, sufficient to bring the design within the limits of legality. The central surmounting figure is now evidently merely part of the structural adornment of the reredos. Its prominence has disappeared, and with that prominence the risk of its being abused has vanished. The panels of the triptych have become, as they should be, the principal feature of the whole erection.

A faculty may therefore go for the proposed reredos according to the amended design, as well as for the other desired

(1) 5 P. D. 131.

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alterations. But inasmuch as the legality of the detached figures depends upon their connection with and subordination to the panels of the triptych, and they would be improper if they were associated with nothing but blank oak below, the faculty will contain a direction that the triptych shall be always open during divine service.

C. F. J.

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March 1; *April* 1.

CHICHESTER AND ANOTHER *v.* QUATREFAGES AND OTHERS.

Probate—Will—Codicils—Implied Revocation—Substituted or Cumulative Legacies.

By a first codicil to his will a testator made a provision for his wife, gave directions as to his burial and monument, and bequeathed pecuniary and specific legacies. On the death of his wife, the testator altered a draft of the first codicil so as to make a second. The second codicil referred to the will but not to the first codicil, and, except that it contained dispositions consequent upon the death, and that one legacy was increased after it had been engrossed, was a repetition of the first codicil. There was no external evidence of the testator's intention as to the two codicils :—

Held, that the second codicil was intended to be substituted for the first codicil, and could alone be admitted to probate with the will.

THE plaintiffs, the executors of the will of Edward Joseph Eyre, who died on June 25, 1894, claimed probate of his will and the second codicil (1) thereto, and the exclusion from probate of the first codicil (1), contending that the second was intended to be substituted for the first. The defendants, who were legatees, claimed the admission to probate of both codicils. The effect of the will, and the circumstances under which the codicils were made, are stated in the judgment.

Bayford, Q.C., and *Bargrave Deane*, for the plaintiffs. Only the second codicil should be admitted to probate. The death of his wife made it necessary for the testator to alter some of the dispositions in the first. Apart from these alterations, and an addition to one legacy, the second codicil is a mere repetition of the first, for which it was clearly intended to be substituted. [They cited *Methuen* v. *Methuen* (2), *Greenough* v. *Martin* (3), and *Thorne* v.

(1) See note at p. 190 below. (2) 2 Phillim. 416.
(3) 2 Add. 239.

Rooke (1), and referred to Williams on Executors, 9th ed. vol. ii. p. 1155.]

Walter Inderwick (with him *Inderwick, Q.C.*), for the defendants. Both codicils should be admitted to probate. The death increased the fund to be distributed, and a court of construction might well hold certain of the legacies to be cumulative. [He cited *Wilson* v. *O'Leary* (2) and *Hooley* v. *Hatton*. (3)]

Cur. adv. vult.

SIR F. JEUNE, PRESIDENT. The question in this case is whether the second of two codicils made by Edward Joseph Eyre was in addition to or in substitution for the first.

The testator made his will on December 1, 1871. Among its provisions we find that he appointed his wife and Lewis Joseph Eyre his brother executors, he gave to his wife certain jewellery and other specific articles, and, subject to a life interest to his wife, gave the residue of his property, as to 5000*l.* to his sister Juliana Stainforth, and as to the remainder to three other sisters, on certain further conditions which it is not necessary to specify.

The first codicil was made on October 3, 1891. Before it and after the will the testator's wife had been confined in an asylum. The testator by this codicil revoked the appointment of his wife and brother as trustees and executors, and appointed his nephew Arthur Chichester and Joseph Raymond Gasquet in their place. He gave directions as to the place of his burial and the monument to be erected over his grave. He then bequeathed the following legacies. [The learned President stated the pecuniary and specific legacies as set out in the text of the codicil, p. 190, below.] The testator proceeded to recite the gift of jewellery and other articles to his wife, and substituted for it a gift to his nieces. He then, after reciting the distribution of his residue, reduced the income of his wife for life to 500*l.*, and, after her death, gave, subject to the gift of 5000*l.* to his sister Juliana Stainforth, the residue to his two brothers Lewis Joseph Eyre and John Joseph Eyre.

(1) 2 Curt. 799. (2) Law Rep. 7 Ch. 448.
(3) 2 White & Tudor's Leading Cases, 6th ed. p. 349.

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After the first codicil, and before the second codicil, which was made on December 1, 1893, the testator's wife died.

It would clearly be allowable to refer to parol evidence bearing on the making of the two codicils. There is, however, no such evidence available. But it appears on the face of the documents that the testator made on a draft of the first codicil certain alterations, and the document so altered became the second codicil.

The second codicil nowhere refers to the first codicil, but only to the will. In it the testator recited the appointment by his will of his wife and brother as trustees and executors, and the death of his wife, and then appointed Arthur Chichester and Joseph Raymond Gasquet trustees and executors. He made a gift to Mary Aldridge of 400*l.*, altering the codicil after engrossment for this purpose. He omitted the recital, and revocation of the gift of jewellery and other articles, to his wife. He omitted the gift of residue to his wife for life, and the subsequent gift of 5000*l.* to his sister Juliana Stainforth, and substituted for it a direction to his trustees to set aside 5000*l.* out of the residue for such sister. The second codicil was otherwise identical in language with the first.

The principles upon which the Court acts in determining what documents constitute the will of a testator are quite clear. The duty of the Court is to ascertain from the contents of the documents themselves, or, if need be, by recourse to external evidence, what was the intention of the testator. Two passages in two judgments of Sir John Nicholl have constantly been referred to as containing the law on the subject. In *Methuen* v. *Methuen* (1) that learned judge said: "In the Court of Probate the whole question is one of intention—the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court"; and in *Greenough* v. *Martin* (2), "In a Court of *Construction*, when the *factum* of the instrument has been *previously* established in the Court of *Probate*, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate, the inquiry is not so limited; for the intentions of the

(1) 2 Phillim. 416, at p. 426. (2) 2 Add. 239, at p. 243.

deceased as to what instrument shall operate as, and compose, his or her will, are to be *there* collected from all the circumstances of the case taken together."

As instances of cases in which this principle has been applied to the case of wills, with the result that the intention to revoke was held proved by inference, I would refer to *Dempsey* v. *Lawson* (1) and *Jenner* v. *Ffinch* (2), both before Lord Hannen. In the former of these cases, as in the present, the contents of the documents constituted the chief, if not the only, elements from which inference of revocation was sought to be drawn.

In the present case it is to be observed, not only that the second codicil refers entirely to the will, and never to the first codicil, but also that (apart from the change in the amount of gift to the nurse effected after the second codicil had been engrossed) the second codicil expressed only the legal effect of the first codicil, having regard to the fact of the supervening death of the wife. The inference seems to me clear. I can understand the testator, after his wife's death, preferring that the testamentary intention of his will should appear to be modified by her death, and not by her previous unfortunate condition, and redrawing the codicil in that view; but it appears to me that he never could have intended that the codicils should stand together, for the purpose only of doubling such legacies as a court of construction might hold to be cumulative. But the case is stronger, I think, when we come to details. There is one gift, as I have said, of an increased amount, and there are several gifts which are mere repetitions as to amount. It was argued before me that if both documents were admitted to probate, a court of construction would hold some at least of these identical gifts to be cumulative. The question, however, of construction of identical gifts in documents admittedly intended to be read together, is not the same as that of the inference to be drawn from such identity as to the existence of such intention; but it is not necessary to rely on these instances. It is impossible to suppose that the specific gift of the India shawl and other articles was repeated for any other reason than that the testator

(1) 2 P. D. 98. (2) 5 P. D. 106.

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intended the second codicil to be a substitute for the first; and the same observation applies to the direction as to the testator's funeral and monument. I have no doubt, therefore, that the testator intended to revoke the first codicil, and substitute for it the second, and that probate should go of the will and second codicil only. Costs of all parties to come out of the estate.

Solicitors for plaintiffs: *Slaughter & Colegrave.*
Solicitors for defendants: *Few & Co.*

NOTE.

The codicils were as follows:—

First Codicil.

This is a Codicil to the last will and testament of Edward Joseph Eyre now residing at 22 New Steyne Brighton in the county of Sussex Esquire and which will bears date the first day of December 1871 I hereby revoke the appointment of my wife Anna Eyre and my brother Lewis Joseph Eyre as executors and trustees of my said will and I hereby appoint my nephew Arthur Chichester of number 30 Norton Road Hove in the said county of Sussex retired Colonel in Her Majesty's Army and Joseph Raymond Gasquet MB of 127 Eastern Road Brighton aforesaid to be the executors and trustees of my said will in the place of the said Anna Eyre and Lewis Joseph Eyre and I declare that my said will and all the bequests powers and provisions therein and herein contained shall be construed and take effect in all respects as if the names of the said Arthur Chichester and Joseph Raymond Gasquet had been originally inserted therein throughout in lieu of the names of the said Anna Eyre and Lewis Joseph Eyre as the executors and trustees thereof I direct that after being taken to the church of Saint John Baptist Bristol Road Brighton my body may

Second Codicil.

This is a codicil to the last will and testament of Edward Joseph Eyre now residing at 22 New Steyne Brighton in the county of Sussex Esquire and which will bears date the first day of December 1871 Whereas by my said will I have appointed my wife Anna Eyre and my brother Lewis Joseph Eyre to be the trustees and executors thereof and whereas the said Anna Eyre has since died Now I hereby revoke the appointment of the said Lewis Joseph Eyre as one of the trustees and executors thereof and I appoint my nephew Arthur Chichester of number 30 Norton Road Hove in the county of Sussex retired Colonel in Her Majesty's Army and Joseph Raymond Gasquet MB of 127 Eastern Road Brighton aforesaid to be the trustees and executors thereof in the place of the said Anna Eyre and Lewis Joseph Eyre And I declare that my said will and all the bequests powers and provisions therein and herein contained shall be construed and take effect in all respects as if the names of the said Arthur Chichester and Joseph Raymond Gasquet had been originally inserted therein throughout in lieu of the names of the said Anna Eyre and

First Codicil—*continued.*

be buried without ostentation in that part of the parochial cemetery of the parish of Brighton which is set apart for the burial of Catholics and that a plain white marble cross may be erected over my grave at the expense of my estate I bequeath the following legacies To the said Arthur Chichester £500 and to the said Joseph Raymond Gasquet in case he shall prove my will £100 to my niece Henrietta Eyre £100 to my sister-in-law the mother of the said Henrietta Eyre my India shawl to my niece Regina Stainforth £100 and to my nurse Mary Aldridge £200 I bequeath to the priest in charge for the time being of St. John Baptist Bristol Road aforesaid the sum of £100 to be expended by him and in his discretion in the relief of the poor of the district surrounding the said church I bequeath to the said Arthur Chichester and Joseph Raymond Gasquet my several boxes containing miscellaneous articles together with the contents thereof and each of such boxes having on it my name and address Upon trust to divide such contents thereof or such of them and in such manner as they shall in their discretion think fit amongst the poor of the district surrounding the church of St. John Baptist aforesaid and the remainder thereof if any in such manner and at such discretion as aforesaid amongst all or any of the members of my family And whereas by my said will I have bequeathed to my said wife all my watches jewels and ornaments of the person other than such as are therein otherwise specifically bequeathed and all my plate plated articles furniture linen glass china pictures prints musical instruments books and other articles of household use or ornament horses carriages saddlery harness and stable furniture live

Second Codicil—*continued.*

Lewis Joseph Eyre as the trustees and executors thereof I direct that after being taken to the church of St. John Baptist Bristol Road Brighton my body may be interred without ostentation in that part of the parochial cemetery of the parish of Brighton which is set apart for the burial of Catholics and that a plain white marble cross may be erected over my grave at the expense of my estate I bequeath the following legacies to the said Arthur Chichester £500 and to the said Joseph Raymond Gasquet in case he shall prove my will £100 to my niece Henrietta Eyre £100 to my sister-in-law the mother of the said Henrietta Eyre my India shawl to my niece Regina Stainforth £100 and to my nurse Mary Aldridge £400 I bequeath to the priest in charge for the time being of the said church of Saint John Baptist Bristol Road aforesaid the sum of £100 to be expended by him and in his discretion in the relief of the poor in the district surrounding the said church I bequeath to the said Arthur Chichester and Joseph Raymond Gasquet my several boxes containing miscellaneous articles together with the contents thereof and each of such boxes having on it my name and address Upon trust to divide such contents or such of them and in such manner as they shall in their discretion think fit amongst the poor of the district surrounding the church of St. John Baptist aforesaid and the remainder thereof if any in such manner and at such discretion as aforesaid amongst all or any of the members of my family I give all my jewellery and ornaments of the person plate and plated articles to my trustees Upon trust to divide the same as nearly as may be in equal shares between my nieces the daughters of

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First Codicil—*continued.*

and dead stock and utensils and wines liquors and household stores and provisions Now I revoke the whole of such last mentioned bequest and instead thereof I give all my jewellery and ornaments of the person plate and plated articles to my trustees Upon trust to divide the same as nearly as may be in equal shares between my nieces the daughters of my four brothers and with an absolute discretion as to the mode of effecting such division which shall not be questioned on the ground of any alleged inequality or otherwise And whereas by my said will I have given the residue of my property real and personal to my trustees upon trust to sell and convert the same into money and after payment thereout of my debts funeral and testamentary expenses I have directed my trustees to invest the residue upon the securities therein mentioned and to pay the income to arise therefrom to my said wife during her life and after her death to set aside £5000 for the benefit of my sister Juliana Stainforth and such of her children as therein mentioned and to divide the residue of my property between my three sisters Madame Bourdonnay du Clesio Mrs. Stainforth and Mrs. Burnell and for the children of my deceased sister Mrs. Lanzer Now I declare that in place of paying the whole of such income of my residuary estate to my said wife during her life my trustees shall out of such income pay to my said wife during her life the annual sum of £500 and after her death and after setting aside the sum of £5000 as directed by my said will in favour of my said sister Juliana Stainforth divide the residue of my property equally between my two brothers Lewis Joseph Eyre and John Joseph Eyre In witness whereof

Second Codicil—*continued.*

my four brothers and with an absolute discretion as to the mode of effecting such division which shall not be questioned on the ground of any alleged inequality or otherwise And whereas by my said will I have given the residue of my property real and personal to my trustees upon trust to sell and convert the same into money and after payment thereout of my debts funeral and testamentary expenses I have directed my trustees to invest the residue upon the securities therein mentioned Now I hereby declare and direct that my trustees shall stand possessed of such residue Upon trust after setting aside the sum of £5000 as directed by my said will in favour of my said sister Juliana Stainforth to divide the residue of my property equally between my two brothers Lewis Joseph Eyre and John Joseph Eyre In witness whereof I have hereunto set my hand this 1st of December 1893.

Signed and declared by the said Edward Joseph Eyre as and for a codicil to his last will and testament in the presence of us who were together present at such signing and who in his presence and at his request and in the presence of each other have hereto subscribed our names as witnesses. Edward J Eyre.

Arthur W. Woods
of Brighton solicitor.
Thomas Jones
22 New Steyne Brighton.

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First Codicil—*continued.*

I have hereunto set my hand this 3rd of October 1891.

Signed and declared by the said Edward Joseph Eyre as and for a codicil to his last will and testament in the presence of us who were together present at such signing and who

Edward J Eyre.

First Codicil—*continued.*

in his presence at his request and in the presence of each other have hereto subscribed our names as witnesses.

Thomas Jones
of 22 New Steyne Brighton
Arthur W. Woods
of Brighton solicitor.

H. D. W.

THE HESTIA.

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March 2, 4, 5.

Admiralty—Salvage—Agreement to tow to a Place of Safety—Non-performance—Right to Salvage apart from Agreement—Refusal to Consolidate Actions—Costs.

Salvage claims rest, not upon contract, but upon the right to be paid out of the property salved, and therefore a salvor who has contributed, though to a small extent, to the ultimate safety of the disabled vessel, is not wholly disentitled to remuneration because he acted under an express agreement which he has failed to perform.

Second salvors who finally rescued the disabled vessel, and to whom substantial remuneration was awarded, had refused to consolidate their action with that of the first :—

Held, that the extra expense thereby caused must be deducted from their costs.

ACTIONS of salvage tried together.

The plaintiffs were the owners, master, and crew of the steamship *Escalona*, and the owners, master, and crew of the steamship *Derwent Holme*. The defendants were the owners of the steamship *Hestia*, her cargo and freight.

The facts, so far as material, were briefly as follows :—

About 9 A.M. on November 2, 1894, when about twenty-two miles E.S.E. of Heath Point, on the island of Anticosti, in the Gulf of St. Lawrence, the *Hestia*—a steel screw steamship of 2434 tons net, and 3790 tons gross, register, with a crew of forty hands, and a general cargo from Glasgow to Montreal—broke her tail shaft outside the stern tube and lost her propeller. She anchored in about forty-two fathoms, and sent a boat to Heath Point to telegraph to Montreal for a tug.

About 10 A.M. on the following day those on board the *Escalona*—a screw steamship of 1234 tons net, and 1880 tons

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gross, register, with engines of 270 horse-power nominal, working up to 1000 indicated, a crew of twenty-seven hands, and a general cargo from Three Rivers to London—observed the signal "Look out for a boat" flying from the lighthouse at Heath Point. The engines of the *Escalona* were stopped, and a boat came off from the lighthouse with the mate and some hands of the *Hestia*, and reported the accident to their ship.

The master of the *Escalona*, having provisioned the boat promised to keep a look-out for the *Hestia*, and shortly before noon, when between twenty and thirty miles from Heath Point, that vessel was seen about four miles off, four points on their starboard bow, flying signals of distress. The weather, at the time, was fine and clear, and the wind was moderate from the westward, but there was some swell.

The *Escalona* bore down upon the *Hestia*, and, by means of a boat from the latter, a manilla hawser was made fast, and when ready for towing the master of the *Hestia* came on board the *Escalona*, and the following agreement was signed: "I hereby agree to pay to the steamship *Escalona* or owners the sum of three thousand pounds (3000*l.*) for towing the steamship *Hestia* from sea to a place of safety. (Signed) John Rennie, master, steamship *Hestia*."

The master of the *Hestia* returned to his ship, got his anchor aboard, and about 2 P.M. the *Escalona* commenced towing, steering W. by S. until the land was sighted, and then passing close to Heath Point in order to pick up the boat of the *Hestia*. Subsequently the wind gradually freshened to a gale from the southward, and, about 10 P.M., the hawser parted, the vessels being then off South Point Light. The *Hestia* thereupon drifted in a northerly direction towards Anticosti, and ultimately getting soundings of seventy-three fathoms, let go both anchors with 135 fathoms on each. The anchors held, and the *Escalona* stood by. Several attempts were then made to establish connection, and about 1.30 P.M., on November 4, the steel hawser of the *Escalona* was hauled on board the *Hestia*; but, before the latter vessel could get her anchors, the hawser parted. The *Escalona* stood by during the rest of that day and night waiting for the weather to moderate.

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On the morning of November 5, the wind, which had veered to the N.W., had moderated considerably, and those on board the *Escalona* hailed the *Hestia* to get in their anchors; but, according to the evidence of the master of the *Escalona*, those on board the *Hestia* said that they could not get their anchors and refused to slip them, and he therefore, after waiting a reasonable time and offering to tow the vessel into the river, agreed to call at Heath Point and telegraph the position of the *Hestia* to Montreal. This he did, and then proceeded on his voyage, after a delay of about fifty-two hours.

By their statement of claim the plaintiffs alleged that the *Escalona* had rescued the *Hestia* from a position of great danger and from probable loss, and they claimed "3000*l*., or, in the alternative, such an amount of salvage as may be just." The defendants by their defence denied that the plaintiffs were entitled to any salvage under the agreement or otherwise, and denied that the plaintiffs had rendered any beneficial services to the *Hestia*. They further alleged that, when the *Escalona* gave up the attempt to salve the *Hestia*, the latter vessel was in a more dangerous position than that from which she had been taken, that the master of the *Hestia* offered to get, and did in fact get, her anchors up within a reasonable time, and that the *Hestia* was ultimately saved by other assistance which was not procured by the *Escalona*.

As the result of the telegrams to Montreal, the tug *Lord Stanley* was sent to the *Hestia* on the evening of November 5, and took her in tow, but was not powerful enough, and, on the hawser parting, the tug lost the *Hestia* in a snowstorm on November 6, after which she drifted to the southward and eastward with her port anchor and a quantity of cable out, flying signals of distress and exhibiting three black balls to shew that she was out of command. She was observed about 9 A.M. on November 7 by the *Derwent Holme*—a screw steamship of 2107 tons gross register, a crew of twenty-three hands, from Maryport to Montreal with a cargo of steel rails—which, with some difficulty, owing to a gale from the northward and snowstorms, made fast, and, the *Hestia* having got her anchor, the towage was commenced and continued that day and night until 6.30 A.M.

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the next day, when, on account of heavy snow, the speed had to be reduced. At 11 P.M. a pilot was taken on board. On the morning of November 9, when off Red Island, the *Hestia* took a heavy sheer across the stream, and the hawser parted. The *Derwent Holme*, however, succeeded, in spite of the strong current and eddies in the St. Lawrence, in making fast again in time to prevent the *Hestia* going ashore, and at 2.30 P.M., on the ebb tide making, both steamships were brought to an anchor. On November 10 there was a fresh gale with snow; but the *Hestia* was again taken in tow and brought safely to anchor off Quebec, after a towage of over 300 miles lasting three days.

In respect of the services of the *Derwent Holme*, the defendants by their defence admitted that the statement of claim gave a substantially correct account, except that they denied that when the *Derwent Holme* fell in with the *Hestia* the latter vessel would have drifted ashore, or that the weather was as bad as alleged.

The values were as follows: *Escalona* 13,000*l.*, cargo 8150*l.*, freight 1670*l.*—total 22,820*l.*; *Derwent Holme* 20,000*l.*, cargo 10,685*l.*, freight 1000*l.*—total 31,685*l*; *Hestia* 24,500*l.*, cargo 9620*l.*, net freight 360*l.*—total 34,480*l.*

Aspinall, Q.C., and *F. Laing*, for the owners, master, and crew of the *Escalona*. The services were performed at the request of the master of the *Hestia*, and the master of the *Escalona* was ready and willing and able to perform the agreement. The reason why the towage contract was not completed was because those in charge of the *Hestia* refused to get their anchors or to slip them. The master of the *Escalona* was, therefore, justified, after waiting a reasonable time, in proceeding on his voyage, and is entitled to the agreed sum.

If, however, the full amount of the agreed reward is not payable, still the *Escalona* is to be compensated on salvage principles for the services she did render, and for the risk she ran in performing them, including the strain to her engines, the damage she sustained, and the loss of her hawsers. When picked up, the *Hestia* was at anchor in a very exposed position on the edge of a bank, and in the gale which subsequently came on she would

have dragged, got into deeper water, drifted out of the track of vessels, and probably foundered. In the place where the *Hestia* was left she was in comparative safety, some fifty miles nearer her destination, and where she could and did communicate with her owners.

Sir Walter Phillimore, and *H. Holman*, for the owners, master, and crew of the *Derwent Holme*. This is not a case of a joint salvage service, for whatever was done by the *Escalona* was undone by the inability of the tug to hold the *Hestia* in the snowstorms which were encountered. The position of the *Hestia* when she signalled to the *Derwent Holme* for assistance was one of extreme peril, and the subsequent towage to Quebec was carried out under circumstances of unusual difficulty. In fact, the *Derwent Holme* successfully performed the service for which the master of the *Hestia* had agreed to pay the *Escalona* 3000*l*.

Joseph Walton, *Q.C.*, and *Butler Aspinall*, for the defendants, the owners of the *Hestia*, her cargo and freight. The master of the *Escalona* entered into a special agreement by which he undertook, for a fixed sum, to tow the *Hestia* to a place of safety. Such an agreement displaces the law of salvage, and depends on common law principles, under which, as he did not perform his contract, he is not entitled to anything: see the notes to *Cutter* v. *Powell* in vol. ii. of Smith's Leading Cases and *The Edward Hawkins*. (1) The case differs from that of *The Benlarig* (2), because there the sum awarded was for fulfilling the contract to "attempt" to tow. If the *Escalona* is to be rewarded on salvage principles, it would be difficult to fix any amount that would represent the very shadowy services rendered by her, and any such services were only in part performance of the agreement, and not independent of it.

As to the services of the *Derwent Holme*, they were, no doubt, of a meritorious character, and entitle that vessel to salvage of a reasonable amount; but the difficulties, and the severity of the weather, have been exaggerated.

Aspinall, *Q.C.*, in reply, on behalf of the *Escalona*. The fact that the salvage agreement fixes the amount to be paid to the

(1) Lush. 515. (2) 14 P. D. 3.

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salvor for his assistance does not alter the character of the service or of the reward, and in Kennedy on Salvage (1) the cases of *The Benlarig* (2) and of *The Cheerful* (3) are commented upon adversely on the ground that the actual benefit conferred upon the salved vessels was lost sight of, and the learned author proceeds to observe that if it is proved that the services of the alleged salvors have been meritorious in character, but there is a doubt as to whether they have in fact contributed to the ultimate safety of the vessel in danger, the rule of the Court of Admiralty, looking to the general maritime interest in inducing men to assist life and property in danger at sea, has been to lean to the view that in fact they have so contributed. In *The Westbourne* (4) it was held that the Court had authority to deal with the question as though no contract had been made, as supervening circumstances had put an end to it.

BRUCE J. [After referring to the nature of the two actions, the learned judge read the agreement already set out, and continued]. The *Hestia* was in a disabled condition, and in a position of some peril when she was picked up by the *Escalona*. After the towage commenced the weather became bad, and the performance of the salvage service was interrupted by the breaking of the hawser. The *Hestia* then let go her anchors in deep water and rode out a gale, the *Escalona* standing by. There seems to have been some misconception on the part of the master of the *Escalona* as to what the *Hestia* was doing, and I think he was mistrustful of his own tackle, and he does not appear to have been able to hold the *Hestia* so as to enable her to get up her anchors. In fact, the master of the *Hestia* did get up twenty fathoms of his starboard chain before the *Escalona* left; but, on the refusal of the master of the *Hestia* to slip, the master of the *Escalona* seems to have come to the conclusion that it was not incumbent upon him to stay there any longer, and, though he sent a message from the lighthouse, he left the *Hestia* without performing the agreement.

(1) A Treatise on the Law of Civil Salvage, p. 34.

(2) 14 P. P. 3.

(3) 11 P. D. 3.

(4) 14 P. D. 132.

I am, therefore, clearly of opinion that, as the *Escalona* did not tow the *Hestia* to a place of safety, the sum of 3000*l.* claimed under the agreement cannot be recovered; but counsel for the defendants have further contended, that as the master of the *Escalona* undertook to render a specified service for a specified sum, and failed to do so, he is not entitled to any salvage reward, even though he may have rendered some service to the *Hestia* contributing to the ultimate safety of that vessel.

I cannot assent to this argument. No doubt it is well established that, where there is a contract to perform a specified service for a specified remuneration, nothing becomes due under the contract until the specified service has been completely performed. Although the service may have been partly performed yet, as the contract is not divisible, no obligation arises out of it to pay any part of the stipulated remuneration, and the existence of an express contract negatives the presumption which might otherwise arise of an implied contract to pay for the work done according to its value.

If salvage claims were dependent upon contract, I should have great difficulty in holding that the *Escalona* was entitled to anything, even on the assumption that she had rendered some service. But salvage claims do not rest upon contract. Where property has been salved from sea perils, and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save.

No doubt the parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist, in the absence of any express contract, or of any circumstances to raise an implied contract. The way in which an agreement affects the question of salvage is laid down by Kennedy J. thus (1): "A salvage agreement is an agreement which fixes, indeed, the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one of which is the preservation of some part at least of the res, that is, ship, cargo, or freight."

(1) A Treatise on the Law of Civil Salvage, p. 42.

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Bruce J.

In the present case I think I must regard the claim of the *Escalona* as if there had been no agreement; and then the question arises, what did the *Escalona*, in fact, do, towards the preservation of the property?

The Elder Brethren agree with me in thinking that, if the *Escalona* had stayed by the *Hestia* a little longer, the probability is that the circumstances would not have proved insurmountable so as to render performance impossible; but those circumstances rendered the completion of the service so difficult that I cannot find that the master of the *Escalona* was guilty of any culpable neglect, and if he did render any service to the *Hestia*, if he did contribute to her ultimate safety, I think he would be entitled to some salvage reward.

I have consulted the Elder Brethren on these points, and they think, and I agree, that it would be very difficult to say that the *Hestia*, when she was left by the *Escalona*, was in a position of much greater safety than when taken in tow; but that she was in a somewhat better position, for she was some fifty miles nearer her destination; she was in a position to communicate with the lighthouse at South Point, and so more readily get assistance, and she was also probably more in the way of vessels passing along the Gulf of St. Lawrence. On these grounds, I think that the *Escalona* did contribute, to a small extent, to the ultimate safety of the vessel, and that, therefore, she is entitled to a small sum. Under all the circumstances, I think the proper sum to award to the *Escalona* is 300*l.*

With regard to the services rendered by the *Derwent Holme*, I am advised by the Elder Brethren, and have no doubt, that when that vessel took the *Hestia* in tow the latter vessel was in a position of great difficulty. She had been abandoned by the tug, she was drifting helplessly, with her anchor down, but not holding, and was within a few miles of the shore. It was bitter wintry weather, thick with snow, and if the *Derwent Holme* had not come up, and, at some risk to herself, promptly rendered the services she did, the *Hestia* might have drifted ashore, and become a total wreck. The position when the hawser parted was also one of difficulty, and the towage, of over 300 miles, lasted three days. Taking into account the values at risk, I

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THE HESTIA.

think, under all the circumstances, the award to the *Derwent Holme* should be 3000*l.*; but as the owners of that vessel have caused some extra expense by not consenting to the consolidation of their action with that of the *Escalona*, I shall direct that 20*l.* be deducted from the costs to which they are entitled.

Award: to Escalona 300*l. and costs; to Derwent Holme* 3000*l. and costs, less* 20*l. nomine expensarum.*

Solicitors for owners, master, and crew of the *Escalona*: *Botterell & Roche.*

Solicitors for owners, master, and crew of the *Derwent Holme*: *Downing, Holman & Co.*

Solicitors for owners of the *Hestia*, her cargo and freight: *Waltons, Johnson, Bubb, & Whatton.*

T. L. M.

[DIVISIONAL COURT.]

1895
April 4.

JONES *v.* JONES.

Husband and Wife—Aggravated Assault—Justices—Separation Order—Right of Husband to give Evidence—24 *&* 25 *Vict. c.* 100, *s.* 43—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4.

A husband who has been convicted by justices of an aggravated assault upon his wife is entitled to give evidence on an application by her for a separation order under s. 4 of the Matrimonial Causes Act, 1878.

Powell v. *Powell* (14 P. D. 177) overruled.

APPEAL of William Jones from a separation order made by two justices of the city of Bristol, by whom he had been convicted of an aggravated assault upon his wife Frances Alice Jones.

At the hearing of the charge, the solicitor for the wife proposed to give evidence of previous cruelty; but this was objected to by the solicitor for the husband, and the objection was sustained. Her examination in chief was confined to the assault; but in the course of her cross-examination and re-examination she made a statement as to previous cruelty. After the conviction, the justices questioned the wife as to her husband's income, and she

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said he had told her that he had 600*l.* a year. They then granted her, under s. 4 of the Matrimonial Causes Act, 1878 (1), a separation order with an allowance of 2*l.* a week and the custody of the child of the marriage. The husband's solicitor did not apply to be allowed to cross-examine the wife as to the alleged previous cruelty or as to her husband's means, and did not tender the husband as a witness. The husband denied on affidavit the statements of the wife as to both matters.

Lord Coleridge, Q.C. (with him *Howland Roberts*), for the appellant. The appeal should be allowed. The justices neglected to satisfy themselves that the future safety of the wife

(1) By the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, "If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide,

"(1.) That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the Court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made;

"(2.) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.

"Provided always that no order for payment of money by the husband or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice."

By Order LIX., r. 4 A., "Appeals from orders under section four of the Matrimonial Causes Act, 1878, shall be heard by a Divisional Court of the Probate, Divorce and Admiralty Division."

was in peril, as the statute requires, and the evidence as to the husband's means was most unsatisfactory. The husband had a right to be heard in his own defence. The decision of Butt J. to the contrary in *Powell* v. *Powell* (1) is, it is submitted, erroneous and not binding on the Court.

J. Alderson Foote, for the respondent. The appeal should be dismissed. Admitting that *Powell* v. *Powell* (1) was wrongly decided, the husband was not tendered as a witness, and the order was properly made on such evidence as was before the justices.

SIR F. JEUNE, PRESIDENT. In this case the justices convicted a husband of an aggravated assault upon his wife, and, having done so, without hearing any further evidence beyond her statement that he had told her that he had an income of a certain amount, held that her future safety was in peril, and made an order against him for separation and maintenance. This evidence as to the means of the husband seems to me altogether insufficient; and, though I do not think the justices to blame, inasmuch as the solicitor for the husband did not cross-examine the wife or offer to call his client, the fact remains that it was on this insufficient evidence that the order was made. This being so, I think that the most convenient course will be to send the case back for rehearing, as I have no doubt the Court has power to do under the statute which gives it jurisdiction to hear the appeal.

As the question may be raised before the justices, I think it right to say that, with all respect to the learned judge who decided *Powell* v. *Powell* (1), I cannot bring myself to believe that a husband has not a right to be heard as a witness upon an application for a separation order. Sect. 43 of 24 & 25 Vict. c. 100, which enables justices to convict persons of aggravated assault, has no special reference to such assaults on wives. It is the Matrimonial Causes Act, 1878, which gives justices power, where a husband has been convicted of such an assault, if they think the future safety of the wife is in peril, to make a separation order containing provisions for maintenance and custody of

(1) 14 P. D. 177.

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The President.

children. Such orders are part of the business of this Division, and I cannot doubt that the legislature intended that justices should proceed in making them substantially as a Court of this Division would do. It cannot have been intended that the mouth of the husband should be closed, on an application before justices for an order, which cannot be made in this Division without his having an opportunity of himself giving evidence. Surely, too, if, as was admitted in the course of the argument, the husband is entitled to give evidence upon an application to vary a separation order, it would be the height of absurdity that his evidence should be excluded upon the original application for one. I need hardly say that I have great hesitation in differing from Butt J.; but there is a precedent for not following his decision in *The Arina* (1), in which the full Court overruled a decision given by Dr. Lushington in an Admiralty matter.

The case must be remitted to the justices, on the terms of the husband paying the costs of the appeal and the rehearing.

BRUCE J. concurred.

Solicitors for appellant: *Ridsdale & Son, for Gregory & Hirst, Bristol.*

Solicitors for respondent: *Ford & Ford, for Wansbrough, Robinson & Tayler, Bristol.*

(1) 12 P. D. 118.

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1895
March 12.

THE FAEDRELANDET.

Admiralty—Collision—Lights—Steamer riding by her Chains with Anchors Unshackled.

A steamship, when near the Goodwin Sands in the English Channel, finding herself unable to make headway against a S.W. gale, unshackled her anchors, banked her fires, shut off steam, and rode, head to wind, by her chains. At sunset she took down the three black balls she had hoisted, and exhibited an anchor light forward, and a globular white light aft.

A sailing vessel also proceeding down channel, and heading about S.S.E., close hauled on the starboard tack, mistook the lights for the masthead and green of a steamer in motion, and, expecting the steamer to give way, kept on her course. A collision occurred:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), affirming the decision of the President (Sir F. H. Jeune), that the steamer was alone to blame, as the lights she exhibited were calculated to mislead, so that the mistake on the part of the sailing vessel was excusable. The steamer, having rendered herself unmanageable, should have exhibited three red lights, and should have kept steam readily available so as to bring herself promptly under command in case required.

APPEAL by defendants, the owners of the steamship *Faedrelandet*, against a decision of the President (Sir F. H. Jeune), finding that vessel alone to blame for a collision with the barque *Aspasia*, owned by the plaintiff.

Between 6 and 7 P.M. on February 25, 1894, the *Faedrelandet* —a Norwegian steamship of 984 tons net, and 1557 tons gross, register, with a crew of twenty-two hands, from Bergen to Barry Roads, in water ballast—was in the Straits of Dover, to the southward and eastward of the Goodwin Sands, riding, head to wind, in twenty-eight fathoms of water, with banked fires, steam shut off, anchors unshackled, and her two anchor chains leading out, about two points from each bow, with 105 fathoms on the port, and seventy-five fathoms on the starboard, chain. In place of three black balls which had been hoisted from 4 to 5 P.M. she was exhibiting an anchor light on the forestay, about twenty feet from the deck, and thirty-five feet from the water. She had also a globular white light aft on the flagstaff about two feet from the taffrail. The weather was dark and overcast, but

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clear, with a gale of wind from the S.W., and the tide was the last quarter ebb running about one knot an hour.

The *Aspasia*, a Norwegian barque of 598 tons register, and a crew of twelve hands, from Grangemouth to Buenos Ayres with coals, was proceeding down channel, heading about S.S.E., close hauled on the starboard tack, under lower topsails, reefed upper topsails, and fore topmast staysail, making about two knots an hour, and four points leeway, when those on board of her saw, about a mile off, and one to two points before the port beam, the two white lights of the *Faedrelandet*, but mistook them for the masthead and green of a steamship in motion. The *Aspasia* was kept on her course by the wind, and, as the *Faedrelandet* did not appear to be getting out of the way, a flare-up light was shewn, and the bell rung, and, at the last moment, the helm of the *Aspasia* was put hard down, but too late to avoid striking the steamer near the bridge, carrying away her own jibboom and bowsprit, and, in consequence of the damage sustained, the masts of the *Aspasia* shortly afterwards went over the side.

The plaintiff, the owner of the *Aspasia*, charged the *Faedrelandet*, inter alia, with failing to comply with art. 17 of the Regulations of 1884 for preventing collisions at sea, by keeping out of the way of the *Aspasia*, or, in the alternative, if the *Faedrelandet* was not under command, with neglecting to exhibit the three red lights prescribed by art. 5 (*a*) of the same regulations.

The defendants, the owners of the *Faedrelandet*, alleged that, on seeing the red light of the *Aspasia* approaching, two flare-up lights were shewn from their steamer as a warning to the *Aspasia* to keep out of the way, and they charged the *Aspasia* with, inter alia, failing to keep clear of the *Faedrelandet*, and with a breach of art. 24 in neglecting to take such proper precautions as were required by the special circumstances of the case.

The action was tried on July 10, 11, 12, and 13, 1894, by the President (Sir F. H. Jeune), assisted by two of the Elder Brethren of the Trinity House, and during the argument the following cases were referred to:—On behalf of the plaintiff: *The Esk, The Gitana* (1); *The Jennie S. Barker, The Spindrift.* (2) On behalf

(1) Law Rep. 2 A. & E. 350. (2) Law Rep. 4 A. & E. 456.

of the defendants: *The Smyrna.* (1) By the Court: *The Indian Chief.* (2)

The learned judge found the *Faedrelandet* alone to blame, and in the course of his judgment said: "What is put forward on the part of the *Faedrelandet* is that she was a steamer at anchor, entitled to claim the rights of a steamer at anchor, or, if she was not a steamer at anchor, that she was not either a vessel not under command, nor a vessel under way, and under those circumstances falls outside the rules altogether, and was justified in exhibiting what lights would be proper under the circumstances, though not being lights distinctly ordered by the rules; but it cannot, I think, be denied that those lights were not proper lights to exhibit in any of the situations which the rules contemplate. They were not the proper lights beyond all question for a vessel at anchor, nor were they, of course, the right lights for a vessel under way, and still less for a vessel not under command, whether proceeding or not through the water.

"If those lights were not only wrong lights, but also had the effect of producing the collision, then, in any event, whether the steamer comes under one of the rules, or under no rule, she must necessarily be to blame. I say under no rule, because if she really was under no rule, and if those lights in such a position were such as to lead another vessel not unreasonably to believe that there was a vessel in motion proceeding on her way, making way through the water, then they were not lights appropriate to be used in that position either. So that what one has to consider is, not only whether these were wrong lights under the rules, but whether they were lights calculated to mislead the sailing vessel, or lights which, in effect, caused the collision.

"Now, was that so? The sailing vessel was undoubtedly making a great deal of leeway. She was not under much canvas, and was making small rate of progress. She was close hauled on the starboard tack. [The learned judge then dealt with the evidence as to seeing the lights of the *Faedrelandet*, and the state of the weather, and continued:—] The view which commends itself to the judgment of the Trinity Masters, and upon

(1) Mentioned arguendo in *The George Arkle*, Lush. 382, at p. 385.
(2) 14 P. D. 24.

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which I rely . . . is that, seeing those lights, a man might very well think that the second light was a green light, because he might expect to see it there, he might take it as a bad green light, or a more or less obscure green light; but, still, it was a light that a man might honestly think was a green light . . . and . . . it appears to me to be the fair inference from the evidence that there was sufficient indication to lead persons who were looking at a vessel, under those circumstances, not unreasonably to believe that there were two lights, that is to say, a top light and a side light, and, at any rate, not to lead them to the conclusion that it was a vessel at anchor. I say under those circumstances, because I think considerable stress ought to be laid on the fact that this was, beyond all question, a most unusual place for a vessel to be brought up to anchor . . . and you would hardly expect persons to have had their minds directed to the probability of a vessel being at anchor there.

"I think, therefore, that the carrying of these two lights in the way in which they were carried did tend to make those on board the sailing vessel believe what they say they did believe, namely, that this was a vessel in motion. . . . The barque was making perhaps even more leeway than she supposed, and this might tend to make those on board her attribute motion to the steamer. [The learned judge then dealt with the evidence as to the engines of the *Faedrelandet* and continued:—] I am inclined to think that the steam ought to have been turned on at an earlier time when the vessel (the *Aspasia*) was seen to be approaching them, so that the steamer would be ready to do the best thing to be done under the circumstances, and have all the force under her control available. . . . I think if the order to move ahead had been obeyed at the moment it was given, if the engineer had been standing by the engines, and the steam turned on, this collision would have been prevented altogether. . . . . I am told that it is not difficult to avoid what arises from the steam not being cut off from the deck (1), namely, the water

(1) It appeared from the evidence that it would take two minutes from the time of giving the order until the engines could move ahead, as two cocks connected with valves would have to be turned, one on deck and one in the engine-room.

getting into the pipes by reason of condensation, by giving a turn ahead or a turn astern occasionally, and that it was quite possible for this vessel to have remained in the position she was in and yet to have had her steam under control.

"I think it right, having considered the matter carefully with the Trinity Masters, to express an opinion that this vessel ought not under the circumstances to be considered as a vessel at anchor within the rules. . . . . The Trinity Masters tell me that the object of putting down chains in this way is not to keep vessels in an absolutely fixed position . . . . but to allow her to ride easily with her head to the wind, and to avoid any difficulty that may arise from her straining at her anchor, or difficulty in getting the anchor up, and therefore that the object and result of that operation is not the same as the effect of a vessel being at anchor. . . . The normal condition of a vessel at anchor is to be fixed. I think the normal condition of a vessel with her chains down is not to be fixed. . . ."

On appeal :—

Aspinall, Q.C., and *Butler Aspinall*, for the appellants (defendants). The question is what lights, under the circumstances, ought the *Faedrelandet* to have exhibited. She was a large steamship, 216 feet long, and, being in ballast, was high out of the water. Finding she could not make any way in the weather then prevailing, and as it would have been dangerous to have attempted to drop her anchors in that depth of water, she unshackled them and brought up with her chains only. She lay safely in that way for some hours, and, as her master ascertained that she did not drift, he was justified in treating his vessel as a stationary object, and exhibiting an anchor light. He also exhibited another light aft to shew the length of the vessel, as is the practice in the Mersey, the Humber, and the Thames. These lights the learned judge in the Court below has found to be wrong; but the vessel was, strictly speaking, not at anchor, nor was she under way; she was, therefore, at the time not within any of the rules, and it is submitted that, as she was practically at anchor, the lights gave a reasonable

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warning of the position of the vessel, and the mistake alleged to have been made on board the *Aspasia*, as to one light being green, arose from want of a good look-out. There was no duty on the *Faedrelandet*, though a steamer, to get out of the way of the *Aspasia*, a sailing vessel, because the steamer was practically at anchor, and the reason why those in charge of the *Aspasia* assumed that the *Faedrelandet* was in motion was in consequence of their neglecting to observe and make proper allowance for their own leeway. As the *Faedrelandet* was held by her chains she was under command, and, therefore, to have exhibited three red lights would have been wrong: *The P. Caland.* (1) As the defendants did not commit a breach of any regulation from which negligence would be implied, and have not been guilty of actual negligence, they cannot be found to blame.

Sir Walter Phillimore, and *Lauriston Batten*, for the respondent (plaintiff), were not called upon.

LORD ESHER M.R. This is a clear case, and it will be seen from the answers to the questions we have put to our nautical assessors that they agree with the advice of the Elder Brethren of the Trinity House, upon which the finding of the Court below is based. The first question is: "Was the master of the *Faedrelandet* justified in placing his steamer where she was, with two chains out ahead, without anchors, with banked fires and steam shut off, and with such lights as she had?" The answer is: "We think the master was justified in placing the steamer where he did, with chains out, without anchors, but the steam should have been kept available, and the three red lights should have been hoisted when the three black balls were hauled down. The riding and stern lights should not have been exhibited."

It is obvious, therefore, that, in the opinion of the nautical assessors, if the master of the *Faedrelandet* chose to place his vessel four miles off the edge of the Goodwin Sands, with two chains out, without anchors, he ought to have kept the steam available, so that if anything came near him he might have the command of his vessel. As it was, what the master did rendered his steamer unmanageable, and, according to the second part of

(1) [1893] A. C. 207.

the answer, he ought to have shewn the three red lights. The master of the steamer, therefore, did what was wrong.

As regards the sailing vessel, we have put this question to the nautical assessors in respect of the lights exhibited by the steamer: "Might the position of the higher white light and the lower white light, with regard to each other, in such a part of the channel, on a dark night, not unreasonably excuse the mate of the sailing ship for supposing, if he caught sight of both lights, that the lower light was the green side light of a steamer"? The answer is: "Most decidedly, yes; it was a very natural conclusion."

We agree with our assessors as to the likelihood of the mate being deceived, and, after having read the evidence, we have come to the conclusion, on the question of fact, that he was so deceived, and really thought the lower light was a green light. He told the master of the sailing ship that there was a steamer going ahead of them shewing her green light, and the master, therefore, did no wrong in keeping his course, for if that were true it was his duty to do so.

The collision was brought about by the wrongful act of the steamer, and the decision in the Court below was right.

LOPES L.J. I am of the same opinion. The advice given us by our nautical assessors clearly establishes, to my mind, that the steamer was to blame. Our assessors further advise us that the lights which were exhibited by the steamer were calculated to mislead, and made the conduct of the mate of the sailing ship excusable, inasmuch as he might reasonably suppose that of the two lights he saw one was a green light. If that were so, he would have reason to believe, and the evidence is that he did believe, that the steamship was in motion. If the steamer was in motion it was the duty of the sailing vessel to keep her course, and it was the duty of the steamer to keep out of the way.

The judgment of the Court below must, therefore, be affirmed.

RIGBY L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants (defendants): *Botterell & Roche.*

Solicitors for respondent (plaintiff): *Thomas Cooper & Co.*

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1894
Nov. 12, 19.

THE ENGLISHMAN AND THE AUSTRALIA.

Admiralty—Collision—Damages—Decree that a Ship and a Tug and her Tow to blame—Joint Tortfeasors—Assignment of Judgment—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict.* c. 97), s. 5.

A steamship came into collision with a tug, which was towing a barque. The owners of the steamship sued the tug and the barque for the sinking of the steamship, and the tug counter-claimed for the damage sustained by her. All three vessels were found to blame, and the decree condemned the owners of the tug and the owners of the barque in a moiety of the claim of the owners of the steamship, and condemned the owners of the steamship in a moiety of the counter-claim of the tug: *The Englishman and the Australia* ([1894] P. 239).

At the reference these amounts were ascertained, and the owners of the barque applied for an order that, on payment to the owners of the steamship of the balance due to them on the respective moieties, the owners of the steamship should, under s. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), execute an assignment of the judgment to them.

Held, by Bruce J., that the application must be refused, as the owners of the barque and the owners of the tug were joint tortfeasors within the principle of *Merryweather* v. *Nixan* (8 T. R. 186), and not co-debtors liable for a debt or duty within the meaning of the Mercantile Law Amendment Act, 1856.

Summons (adjourned into Court) by the owners of the barque *Australia*, co-defendants in an action of damage by collision, calling on the plaintiffs, the owners of the steamship *Ada*, to shew cause why on paying them (the plaintiffs) the amount of the damages and interest recoverable under the judgment in the action, and such other sum as might be the balance of costs and interest recoverable thereunder, the plaintiffs should not be ordered to execute to them (the defendants) an assignment of the judgment.

The facts giving rise to the application were shortly that—

On February 22, 1894, a collision occurred in the North Sea between the steamship *Ada* and the steam tug *Englishman*, which was at the time towing the barque *Australia*. The *Ada* sank and the *Englishman* was damaged. The owners of the *Ada* sued the tug and her tow, and the owners of the tug counter-claimed against the *Ada*.

At the trial before the President (Sir F. H. Jeune), assisted

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by two of the Elder Brethren of the Trinity House, the learned judge found all three vessels to blame, and by his decree condemned the defendants, the owners of the *Englishman* and their bail, and the defendants, the owners of the *Australia* and their bail, in a moiety of the damage sustained by the plaintiffs, and condemned the plaintiffs and their bail in a moiety of the damage sustained by the *Englishman*. (1)

At the reference the moiety of the damages due to the plaintiffs, the owners of the *Ada*, and her master and crew proceeding for their effects, was assessed at 3428*l.* 19*s.* 9*d.*, and with interest at 4 per cent., 80*l.* 8*s.* 3*d.*, made a total of 3509*l.* 8*s.* The moiety of the damages due to the defendants, the owners of the tug *Englishman*, was assessed at 237*l.* 13*s.* 3*d.*, and the interest thereon amounted to 3*l.* 19*s.* 8*d.*, making a total of 241*l.* 12*s.* 11*d.*

It was contended on behalf of the defendants, the owners of the *Australia*, that the judgment was for the difference between those two sums, viz. 3267*l.* 15*s.* 1*d.*, and that upon payment of that difference to the owners of the *Ada*, together with 30*l.* 12*s.* 6*d.* for costs and interest, they were entitled to the assignment asked for under that part of s. 5 of the Mercantile Law Amendment Act, 1856, which deals with co-debtors. (2)

(1) The decree is set out in the report of the case, [1894] P. 239.

(2) 19 & 20 Vict. c. 97, s. 5: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

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T. E. Scrutton, for the defendants, the owners of the *Australia*, in support of the summons.

Sir Walter Phillimore, and *A. E. Nelson*, for the plaintiffs, the owners of the *Ada*.

Butler Aspinall, for the defendants, the owners of the *Englishman*, who though they were not served were allowed to appear as parties interested.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned, the following were referred to: *Wooley* v. *Batte* (1); *The Niobe* (2); *The Avon and Thomas Joliffe* (3); *Batchellor* v. *Lawrence*. (4)

Cur. adv. vult.

1894. Nov. 19. BRUCE J. [After referring to the facts, the decree in the action, and the result of the reference, the learned judge proceeded:—] The sum mentioned in the summons, viz. 3267*l.* 15*s.* 1*d.*, is arrived at on the principle of deducting, from the amount in which the owners of the *Australia* and the *Englishman* have been condemned, the amount in which the owners of the *Ada* have been condemned in respect of the counter-claim established by the owners of the *Englishman* against the *Ada*. In other words, the owners of the *Australia* claim the benefit of the *Englishman's* counter-claim, and propose to pay to the *Ada* no more than the *Englishman* would be bound to pay.

The application is based on the provisions of s. 5 of the Mercantile Law Amendment Act, 1856.

In considering whether the application should be granted, one objection of form is not unworthy of consideration: there is no provision in the section enabling the Court to exercise the jurisdiction thereby conferred upon motion, and *Phillips* v. *Dickson* (5) is a direct decision that advantage cannot be taken of the section in question upon motion, and, so far as I can discover in all the cases in the books in which relief has been given, otherwise than in administration actions, an action has been instituted for the express purpose of claiming the

(1) 2 C. & P. 417.
(2) [1891] A. C. 401.
(3) [1891] P. 7.
(4) 9 C. B. (N.S.) 543.
(5) 8 C. B. (N.S.) 391.

relief. I am, however, exceedingly reluctant to rest my decision upon a mere question of form, and therefore I propose to consider the application as if it had been brought before the Court in a formal and regular manner.

The first question to be considered is whether the owners of the *Australia* come within the words "person . . being surety for the debt or duty of another or being liable with another for any debt or duty." It is not contended that the applicants are sureties, but it is said that they are liable with another (the owners of the *Englishman*) for a debt or duty: that the owners of the *Englishman* are co-debtors with the owners of the *Australia* to the owners of the *Ada*. It is clear that the owners of the *Australia* only become liable upon the judgment, and, if they and the owners of the *Englishman* are co-debtors, they are co-debtors only by virtue of the judgment. On the construction of the section I think the liability creating the obligation of the two persons as co-debtors is a liability which must be existing prior to and independently of the "judgment, specialty or other security" the assignment of which is contemplated. The "judgment, specialty or other security" referred to in the section as "held by the creditor in respect of such debt or duty" refers, I think, to something in the nature of a security for the debt or duty, and implies that the obligation to pay the debt or perform the duty springs from some other source than the judgment, specialty or security. As there was no joint liability prior to the judgment, and the owners of the *Australia* and the owners of the *Englishman* were not co-debtors prior to the judgment, the 5th section of the Mercantile Law Amendment Act, 1856, does not in my opinion apply.

But it does not seem to me to be necessary to rest my decision upon a verbal criticism of the section. The 5th section of the Mercantile Law Amendment Act was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of or sprang from contract. It was certainly never intended to overrule the principle of *Merryweather* v. *Nixan* (1), or to give a right to demand an

(1) 8 T. R. 186.

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assignment in cases where no right of indemnity exists. As in the course of the argument a good deal was said about *Merryweather* v. *Nixan* (1), it may be well that I should state the doctrine which it appears to me that case establishes.

The facts were these: The plaintiff and defendant had been held jointly liable to the extent of 840*l.* in an action brought against them by the owner of a reversionary interest in a mill for damage done by them to the mill. The whole 840*l.* was levied on the plaintiff, who sought to recover in an action of assumpsit contribution from the defendant. Thomson B. held that no *implied* assumpsit arose as between joint wrongdoers, and non-suited the plaintiff. Lord Kenyon and the judges of the King's Bench held the non-suit right. Lord Kenyon said he had never heard of such an action having been brought where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. Then he added: "This decision would not affect cases of *indemnity* where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right." The meaning of that sentence is, I think, this: although no *implied* indemnity arises from the simple fact that one of two tortfeasors has paid the whole of the damage for which both are liable, yet this principle does not affect cases where one man has employed another to do acts for the purpose of asserting a right either under an express indemnity or under such circumstances as to raise an implied indemnity, provided the acts are not of such a character as to be obviously unlawful. *Adamson* v. *Jarvis* (2) affords an example of the class of cases to which Lord Kenyon referred. In that case the plaintiff, an auctioneer, sold goods under order of the defendant, and paid the proceeds to the defendant. The defendant induced the plaintiff to sell the goods by representing to him that the defendant was of right entitled to sell them, and the plaintiff in good faith acted on that representation. The defendant was not entitled to sell the goods, and the true owner recovered the value from the plaintiff, and the plaintiff brought his action against the defendant to

(1) 8 T. R. 186. (2) 4 Bing. 66.

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recover the amount he had been so compelled to pay. The plaintiff was held entitled to recover. Best C.J. said in the course of his judgment: "The plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale." The circumstances of the case were such as to raise an implied warranty to indemnify. It was never decided in *Merryweather* v. *Nixan* (1) that one wrongdoer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liabilities by one of several wrongdoers. Where the circumstances are such as to raise a promise to indemnify, then the indemnity may be enforced, except, in the words of Best C.J., in "cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the person knew that the act he is engaged to do is not only wrongful but unlawful, then the promise to indemnify is an unlawful contract, in contravention of public policy, and one that cannot be enforced in law. *Betts* v. *Gibbins* (2) is a case of the same character as the one I have last referred to. The plaintiff dealt with goods under the orders of the defendant under such circumstances as to raise a promise on the part of the defendant to indemnify the plaintiff. There was nothing clearly illegal in the act of the plaintiff, and he was held to be entitled to recover on the implied indemnity.

The case of *Pearson* v. *Skelton* (3) was referred to in the argument. The plaintiff and defendant and several other persons were partners concerned in running a public stage-coach. A person whose horse was killed by the negligence of a coachman employed by the partners to drive the coach recovered damages against the plaintiff, and the plaintiff sought to recover contribution from the defendant. There appeared to be a partnership fund, out of which expenses were first to be paid, and the residue divided among the proprietors. The principle of *Merryweather* v. *Nixan* (1) did not apply, because there was an express contract regulating the rights of the plaintiff and defendant; but, notwithstanding, the action was held not to be maintainable at law,

(1) 8 T. R. 186. (2) 2 Ad. & El. 57.
(3) 1 M. & W. 504.

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because the rights of the partners could only be adjusted in the Court of Chancery.

An examination of the cases has led me to the conclusion that the actual point decided in *Merryweather* v. *Nixan* (1), that an implied indemnity does not arise as between joint tortfeasors, simply by reason of the payment by one of the whole of the joint liability, has never been questioned. Circumstances may exist, as in some of the cases referred to, which give rise to an implied indemnity, or there may be an express indemnity, and where there is such an indemnity, implied or express, it may be enforced, unless the contract of indemnity relates to the doing of an act which is illegal, and must be presumed to have been known to be illegal by the person seeking to enforce the indemnity. This view of the law is quite consistent with the observations of Lord Herschell L.C. in the case of *Palmer* v. *Wick Steam Shipping Co.* (2), to which attention was directed in the argument. The Lord Chancellor is not speaking of the circumstances which may raise an implied promise to indemnify: he is addressing himself to the consideration of the alleged doctrine that one joint tortfeasor never can recover from another, and he expresses the opinion that in cases where an express or implied indemnity exists, the doctrine can only apply to prevent the tortfeasor from recovering when he must be presumed to have known that he was doing an unlawful act. I do not think that the observations were intended to mean that, wherever the act done by joint tortfeasors was not in itself unlawful, an indemnity is to be implied from the mere fact that one tortfeasor has paid, under compulsion, the whole damages arising from the tort. So to lay down the law would be, as it seems to me, to overrule the exact point decided in *Merryweather* v. *Nixan.* (1) That, it is clear, Lord Herschell did not intend to do, because he says, "It is now too late to question that decision in this country." In fact, Lord Herschell does not seem to have done more than express his approval of the exposition of the law contained in the judgment of Best C.J. in the case of *Adamson* v. *Jarvis.* (3)

I have come to the conclusion that there are no circumstances

(1) 8 T. R. 186. (2) [1894] A. C. 318.
(3) 4 Bing. 66.

in the present case to raise an implied promise of indemnity, and I do not think that the applicants are entitled to the order they seek.

I should say, further, that I think the statute applies only in cases where payment has been made. Had an action been brought by the owners of the *Australia* to compel an assignment of the judgment, the payment of the amount of the joint debt would have been a necessary allegation in the statement of claim.

Further, in this case I do not gather that there has ever been an offer to pay the amount of the damages in which the *Australia* has been condemned. The offer made, as I understand, has been to pay only the balance due after taking into account the counter-claim of the *Englishman*. No doubt, according to the decision in *The Khedive* (1), the balance only could be recovered from the *Englishman*. But I see no reason why the owners of the *Australia* should deduct from the amount of their liability the amount due to the owners of the *Englishman* in respect of their claim.

Summons dismissed with costs.

Solicitors for plaintiffs, the owners of the *Ada*: *Lowless & Co.*

Solicitors for defendants, the owners of the *Englishman*: *Pritchard & Son.*

Solicitors for defendants, the owners of the *Australia*: *Thomas Cooper & Co.*

(1) 7 App. Cas. 795.

T. L. M.

1895
April 24, 26, 30.

BEAUCLERK *v.* BEAUCLERK. (1)

Divorce—Husband's Adultery and Desertion—Separation Deed—Unreasonable Delay in presenting Petition—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband, who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights, has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion."

In a petition by a wife for the dissolution of her marriage, it appeared that her husband and she were married in 1858, but had lived voluntarily apart under a separation deed since 1870. In 1890 she had petitioned for a divorce on the ground of adultery coupled with cruelty, but her petition had been dismissed on the ground of unreasonable delay. She afterwards wrote to her husband proposing that they should live together, and, upon his refusal, sued in 1894 for restitution of conjugal rights. Her husband did not plead the deed of separation, and she obtained a decree. Her husband did not comply with the decree, and had been guilty of adultery. The wife now claimed a divorce on the ground of adultery coupled with desertion under the above section. It would have been impossible for her to prove a desertion before the refusal of her husband to resume cohabitation:—

Held, that, as there was nothing to shew when the husband became unable or unwilling to use the deed of separation as an answer to the suit for restitution of conjugal rights, it was impossible to say that such suit was practicable before it was in fact instituted, and that the Court was therefore justified in holding that there had been no unreasonable delay, and in granting a decree nisi for the dissolution of the marriage.

Tress v. *Tress* (12 P. D. 128) followed.

Semble, per Sir F. Jeune, President, that, where a petitioner, having a complete case for dissolution of marriage on the grounds of adultery and desertion, is guilty of unreasonable delay in bringing it forward, she does not avoid the consequence of that delay by obtaining a decree for restitution of conjugal rights, and that when there has been unreasonable delay in applying for resti-

(1) See *Beauclerk* v. *Beauclerk*, [1891] P. 189.

tution of conjugal rights, such delay, though it be no ground for refusing the application, may be ground for the Court exercising its discretion on the subsequent petition for dissolution.

PETITION by Evelyn Georgina Matilda de Vere Beauclerk for the dissolution of her marriage with Aubrey de Vere Beauclerk. The petitioner had, in 1894, obtained a decree for restitution of conjugal rights, with which the respondent failed to comply. She claimed the dissolution of the marriage on the ground of adultery coupled with desertion, pursuant to s. 5 of the Matrimonial Causes Act, 1884. (1) The respondent did not appear.

The facts and the argument for the petitioner are stated in the judgment. (2)

(1) By s. 5 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband, who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights, has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion. Such decree nisi shall not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time."

(2) The following is an extract from the examination of the petitioner:—

The President: I should like to know when you finally separated from your husband.

The petitioner: In 1870.

The President: There was a separation deed, was there not?

The petitioner: There was. I was advised to sign it.

The President: What is your explanation of the long delay in bringing this suit?

The petitioner: I am anxious to explain. I said at the former trial that I had difficulty, but I had not the opportunity of explaining. The difficulty was that my solicitor told me that I should not be able to prove cruelty.

The President: I should like you to tell me why you did not bring a suit in 1870?

The petitioner: I was advised that a temporary private separation would be preferable to going into Court. I hoped that my husband would change his mode of life. In 1877, too, I was anxious for a divorce, but was advised that I could not prove cruelty.

The President: Can you tell me

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BEAUCLERK v. BEAUCLERK.

Sir Henry James, Q.C., and *Searle*, for the petitioner.

Cur. adv. vult.

SIR F. JEUNE, PRESIDENT. In this case the petitioner obtained a decree for restitution of conjugal rights on June 4, 1894. The order was disobeyed by the respondent, and at a subsequent date in the same year he is proved to have committed adultery.

The right of the petitioner to a divorce would therefore be clear, were it not that there are other facts which give rise to a question, whether there has been such unreasonable delay as to induce me, in the exercise of my discretion under the 31st section of the Act of 1857, to refuse that relief.

The marriage between the parties took place on December 1, 1858. On July 18, 1870, they separated under a deed, the terms of which shew that the separation was at that time voluntary on both sides. In August, 1890, (see *Beauclerk* v. *Beauclerk* (1)) the petitioner presented a petition for divorce on the ground of cruelty before the separation and of adultery alleged to have been committed in 1889. The acts of cruelty charged shewed that the respondent had, to the knowledge of his wife, committed adultery before the separation. Butt J., after requesting the Queen's Proctor to argue the matter, refused a divorce on the ground that the acts charged did not constitute legal cruelty, but offered to grant a judicial separation on the ground of adultery.

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why it was that in 1890, when you did bring your suit, you did not charge desertion?

The petitioner: My solicitor thought it better to charge cruelty.

Sir Henry James: I cannot re-examine upon your Lordship's questions, but I understand that, at the time when the deed was entered into, the lady supposed that the separation was to be temporary only.

The petitioner: We hoped that the separation would be only temporary.

Sir Henry James: Did you receive this letter? [He handed the witness a letter from a solicitor, dated May 12, 1870, containing the passage: "I do not anticipate any difficulty in making an arrangement for what I sincerely trust may be but a temporary separation."]

The petitioner: I did.

Sir Henry James: Then, my Lord, may I also put in the fact that in 1885 a learned counsel advised that there was no ground for a charge of cruelty, and none for one of desertion, in face of the deed?

The President: Yes.

(1) [1891] P. 189.

On appeal by the petitioner, the Court of Appeal did not express a decision whether the conduct of the respondent had amounted to cruelty, but held that there had been unreasonable delay in presenting the petition, and, on that ground, affirmed the decision of Butt J.

In his argument before me, Sir Henry James relied on the terms of the Matrimonial Causes Act, 1884, which makes a respondent who fails to comply with a decree of the Court for restitution of conjugal rights guilty of desertion, and provides that in such case "the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion." It was, therefore, contended that no period before the disobedience to the decree for restitution of conjugal rights ought to be considered as a period of delay.

In *Bigwood* v. *Bigwood* (1) Lord Hannen said: "I am of opinion that s. 5 of the Act of 1884 places the discretion which arises on a disobedience to a decree for restitution of conjugal rights on the same footing as desertion for two years with all its consequences, and it may be coupled with adultery either before or after the decree of restitution." I entirely assent to that proposition, and I may add that the statement in the usually most accurate work of Brown and Powles on Divorce (5th ed. p. 138), that in *Smith* v. *Smith* (2) "the Court expressed a doubt whether it was intended to use the Act of Parliament for the mere sake of obtaining a divorce," does not seem to be well founded. Nor do I think, as I said when the suit of the petitioner for the restitution of conjugal rights was before me, that delay is any answer to a petition for restitution of conjugal rights. But in this case I do not think it necessary to go the length of assenting to Sir Henry James's argument. I wish to guard myself from being supposed to hold that, where a petitioner having a complete case for dissolution on the grounds of desertion and adultery, is guilty of unreasonable delay in bringing it forward, she avoids the consequences of that delay by obtaining a decree for restitution of conjugal rights, or that, when there has been unreasonable delay

(1) 13 P. D. 89. (2) 58 L. T. (N.S.) 639.

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in applying for restitution of conjugal rights, such delay, though it be no ground for refusing such application, may not be ground for the Court exercising its discretion on the subsequent petition for a dissolution. It is perfectly true that the petition for dissolution in such case is founded on a desertion which is in a sense recent, if the suit for restitution of conjugal rights be recent. But it may well be said that it would unduly limit the effect of the 31st section of the Act of 1857 to deny that it applied in such a case; and it may well be doubted if it was the intention of the Act of 1884 to afford a method of obtaining a divorce in spite of long acquiescence in matrimonial misconduct.

In the present case, however, I do not think that there has been any such unreasonable delay as to deprive the petitioner of her right. It is not easy to follow the decision of the Court of Appeal in *Beauclerk* v. *Beauclerk* (1) as reported, because it is not clear why it appeared to the Court of Appeal that they were affirming an exercise of discretion by Butt J., whereas that learned judge decided the case solely as a question of the legal nature of cruelty. But I will assume that the petitioner would have been guilty of unreasonable delay in claiming a dissolution on the grounds of adultery and cruelty. It does not, however, follow that she has been guilty of unreasonable delay in presenting this petition, based, as it is, on adultery and desertion. Owing to the separation having been at first by the will both of husband and wife, and having apparently so continued until the letter which preceded the suit for restitution of conjugal rights, and the answer to it, the petitioner could not before that date have proved desertion. Was there, then, unreasonable delay in applying for restitution of conjugal rights? Apart from other considerations, there is, I think, a conclusive reason why I am not called on to say that there was. As the deed of separation, which might have been an answer to the suit for restitution, was not set up by the husband, I decided, following the case of *Tress* v. *Tress* (2), that there was nothing to prevent the decree for restitution. But it is impossible for me to say that the petitioner's suit for restitution of conjugal rights was practicable, before it was in fact instituted, because I cannot tell when the

(1) [1891] P. 189. (2) 12 P. D. 128.

husband first became unable or unwilling to use the deed as an answer to the wife's claim.

There will, therefore, be a decree nisi with costs.

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Solicitors: *Leman, Groves & Leman.*

H. D. W.

[IN THE CONSISTORY COURT OF ROCHESTER.]

1895 *March* 16.

IN RE PLUMSTEAD BURIAL GROUND.

Ecclesiastical Law—Faculty—Addition to Churchyard—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *s.* 44—*Consecrated Ground—Want of Jurisdiction to sanction Conversion to Secular Use.*

The vicar and churchwardens of a parish church in the diocese of Rochester petitioned the Ordinary to decree a faculty to authorize a strip of consecrated ground, added to the churchyard under the Burial Act, 1852, but in which burials were prohibited by Secretary of State's order, being taken therefrom and made part of an adjoining public highway for the purpose of widening the same. In their petition they alleged (inter alia) that no interments had ever been made within the portion of the churchyard proposed to be so dealt with by the faculty; that inconvenience was caused to persons attending the church from there being no pathway on the side of the highway adjacent to the churchyard; and that the proposed widening would enable such a pathway to be made, and would greatly conduce to the convenience of those attending the church as well as of the general public. The citation to lead the faculty was by order moved for in Court.

On the hearing of the motion the Chancellor of the Diocese of Rochester, being of opinion that by granting the faculty prayed for he would be authorizing the appropriation of consecrated ground to secular uses, thus entertaining a cause beyond the jurisdiction of the Court, refused the motion.

ON the 12th of February last the Rev. James Adair M'Allister, vicar of the parish of Plumstead, in the county of Kent and diocese of Rochester, and William Trump and John Thomas Taylor, the churchwardens of the same parish, presented a petition whereby they prayed the Court to decree a faculty to issue to authorize a strip of land, forming part of an additional burial ground added to the parish churchyard, and shewn on a plan annexed to the petition, being taken from the said burial ground and converted into roadway, so as to cause the roadway running along the southern boundary of the churchyard to be forty feet in width from the opposite kerb, as shewn on the said plan.

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The petition as presented alleged in substance as follows:—

"In the year 1860 the piece of land shewn on the plan annexed hereto was conveyed to the Ecclesiastical Commissioners for England, and was added to the churchyard of the parish of Plumstead pursuant to 15 & 16 Vict. c. 85, and the said piece of land was duly consecrated as an additional burial ground for the said parish. In accordance with 15 & 16 Vict. c. 85, s. 44 (1), one of Her Majesty's principal Secretaries of State on February 10, 1891, made the following regulation: No grave shall be made within five yards of the southern boundary of the said burial ground. On August 28, 1893, an order was made by one of Her Majesty's Secretaries of State to the effect that no vaults or earthen graves shall be made within twenty yards of the southern boundary of the said burial ground. The Home Secretary, by the said order of August 28, 1893 has required that the said burial ground shall be effectively fenced. The vicar and churchwardens have no funds for such purpose. The vestry of the said parish (under the Metropolitan Management Act, 1855) are prepared in the event of the said strip of land being converted into roadway, as before stated, properly to fence the whole of the said additional burial ground except where it adjoins the old churchyard."

An intimation having been received from the registrar that the citation in the cause must be applied for after argument in Court, counsel, on behalf of the petitioners, now moved the Chancellor of the Diocese of Rochester (Lewis T. Dibdin, Esq.) to decree the usual citation with intimation to issue (2); the following additional allegations having been by leave of the Court inserted by way of amendment in the petition during the hearing of the motion:—

"The roadway running along the southern boundary of the

(1) The 15 & 16 Vict. c. 85, s. 44, is as follows: "It shall be lawful for one of Her Majesty's principal Secretaries of State from time to time to make such regulations in relation to the burial grounds . . . which may be provided under this Act as to him may seem proper, for the protection of the public health and the maintenance of public decency, and the burial boards and all other persons having the care of such burial grounds . . . shall conform to and obey such regulations."

(2) The Court sat in the vestry house of St. Saviour's, Southwark.

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said churchyard is inconveniently narrow, and it is desired to take a strip of the said burial ground where burials cannot take place about ten or twelve feet in width and throw it into the roadway, thereby causing the roadway to be forty feet in width from the opposite kerb, as shewn in the said plan. There is no pathway on the south side of the said churchyard; and the road to the south of the said churchyard is not lighted on the north side. Inconvenience is thereby caused to persons attending the said church, and the proposed widening of the road will enable a pathway to be made to the south of the said churchyard, and will greatly conduce to the convenience of those attending the said church as well as of the general public. No interments have been made within the strip of land proposed to be thrown into the road."

Boxall, for the petitioners, in support of the motion. Assuming the allegations of fact in the amended petition to be taken as proved for the purposes of the present motion, it is clear that, if the faculty asked for is granted, the conversion of the piece of land referred to in the petition into roadway will not be the use of consecrated ground for mere secular purposes, but that it has an ecclesiastical object, and will be for the substantial benefit of the congregation attending the parish church of Plumstead both with respect to the pathway there mentioned, and to the new fence to be provided at the expense of the ratepayers. The grant of the faculty is therefore in the discretion of the Court, and the citation ought to issue. On many occasions, in other dioceses than that of Rochester, faculties have been granted in similar cases. Indeed, it has been the practice for the last twenty-five years to grant faculties of this nature in the diocese of London, in the case of churchyards where burials are no longer allowed, and in *The Vicar and Churchwardens of St. Botolph* v. *Parishioners of the Same* (1), Dr. Tristram, the chancellor of that diocese, shews how the practice of granting such faculties originated, and decided that an Ecclesiastical Court has jurisdiction to grant them where in the discretion of the Ordinary, exercised with regard to the changed circumstances

(1) [1892] P. 161.

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of the present day, he is of opinion that the appropriation asked for will be for the benefit of both the parishioners and the public. Subsequently a further decision on the same point was made in the same Court in *In re St. Nicolas Cole Abbey.* (1) The following are instances in other dioceses than that of London where faculties have been granted for widening adjacent public streets. On August 20, 1891, the Chancellor of the Diocese of Worcester, J. S. Dugdale, Esq., Q.C., granted an unopposed faculty authorizing the vicar and churchwardens of Great Malvern parish church to appropriate a portion of the parish churchyard for such a purpose, the vicar and churchwardens having made a declaration that to their knowledge no interments of remains had taken place in the portion of the church proposed to be thrown into the roadway (2); and recently two similar faculties have been granted by Dr. Tristram in the Consistory Court of Chichester, one on August 17, 1894, in the case of *St. Mary-in-the-Castle, Hastings* (3), and the other on November 7, 1894, in the case of *Vicar and Churchwardens of St. Andrew's, Hove, and the Hove Commissioners* v. *Mawn and Rowe and Others cited.* (4) In the latter case the issue of the faculty asked for was opposed, and the older cases containing dicta adverse to the proposition that consecrated ground can legally be devoted to secular uses were referred to. (4) Of these the principal ones

(1) [1893] P. 58.

(2) Not reported.

(3) See the judgment in the *Hove Case* set out in the next note, and see *The Hastings and St. Leonards News* of August 17, 1894.

(4) [IN THE CONSISTORY COURT OF CHICHESTER.]

THE VICAR AND CHURCHWARDENS OF ST. ANDREW'S, HOVE, AND THE HOVE COMMISSIONERS *v.* MAWN AND ROWE AND OTHERS CITED.

THIS was a cause of faculty instituted on the promotion of the Rev. Thomas Pearcy, the vicar, and E. J. Heathcote and A. F. Bond, the churchwardens of the church of St. Andrew's, Hove, in the diocese of Chichester, and the Hove Commissioners, for the purpose of obtaining a faculty to permit the carrying out a proposed widening of Church Road, Hove, over a portion of the churchyard of St. Andrew's, Hove, aforesaid, and the removal of remains necessitated by such alteration in the said churchyard.

The petition contained averments to the effect that Church Road, Hove, was much in need of being widened and improved, and much inconvenience and some danger was assured by reason of a contracted portion thereof, at a point where St. Andrew's churchyard projected into the direct line of traffic; that in order to widen the road as proposed, it would be neces-

appear to be the following: *The Rector and Churchwardens of St. John's, Walbrook* v. *The Parishioners thereof and Others* (1), *Harper*

sary to interfere with a part of the churchyard to the depth of thirty and forty feet throughout its whole length; that in the portion of the churchyard which would be required there were 317 graves, varying in date from 1731 to 1891, but that by the works to be done under the faculty prayed for it was only intended to remove and rebuild the existing south wall of the churchyard, to remove and re-erect within the new boundary wall any existing memorial stones disturbed, and to remove the surface mould to the depth of twelve inches only, hardening the surface with chalk and road metal, without disturbing any graves or former burials; that by an Order of Council of May 22, 1883, burials in the churchyard were prohibited, with some few exceptions in favour of relatives of those already interred therein; and that if the proposed works were carried out the Hove Commissioners would pay 2000*l.* to trustees as a further endowment to St. Andrew's, Hove.

1894. Nov. 7. The cause was now heard on oral evidence before the Chancellor of the Diocese of Chichester, (Dr. Tristram, Q.C.), sitting in the church of St. Andrew's, Hove.

Boxall, on behalf of the petitioners, referred to *The Vicar and Churchwardens of St. Botolph* v. *The Parishioners of the Same* ([1892] P. 161).

Miss H. A. Mawn, a parishioner interested in a brick grave proposed to be interfered with under the faculty, and other parishioners interested in similar graves, appeared by their solicitors in opposition to the grant of the faculty, and relied on *Harper* v. *Forbes* (5 Jur. (N.S.) 275), *Reg.* v. *Twiss* (L. R. 4 Q. B. 407), and Cripps on the Law of Church and Clergy, p. 438, and the cases there cited, as authorities that the Court had no jurisdiction to appropriate consecrated ground to the widening of a public highway.

Miss Rowe, another opponent, appeared in person.

The result of the evidence and of the inspection of the churchyard by the Court appears from the judgment.

DR. TRISTRAM. The petitioners for this faculty are the vicar and churchwardens of the parish of Hove, who have been authorized by a vote of the parish vestry to make the present application. The Hove Commissioners have joined in the petition, and are prepared out of the rates to bear the whole expense occasioned by the proposed alterations, and to contribute a sum of 2000*l.* towards the endowment of the vicarage, if the faculty is granted.

The grounds upon which they ask that the faculty shall be granted is that the part of Church Road which abuts on the churchyard has become one of the principal thoroughfares in Hove, and that, owing to the increase of traffic along it and to the narrowness of this part of the road, it is essential for the safety of the public passing along it, as well as for that of the parishioners in going to and from their parish church, that the proposed alteration should be made.

The churchyard was closed for burials by an Order in Council issued

(1) 2 Roberts. 515; 16 Jur. 645.

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v. *Forbes* (1), and *Reg.* v. *Twiss* (2); but none of them are, it is submitted, of any binding authority in the present case, where some years ago, except as regards members of certain families buried there.

Evidence of the necessity and urgency of the proposed alteration has been given by eight witnesses. In their evidence the witnesses on this part of the case one and all agree that the sudden narrowness of that part of Church Road which abuts on the churchyard is a source of difficulty and danger to persons walking or driving along it; that the narrowness of the angles at the east and west corners are most dangerous, especially the one at the west corner, and that in consequence thereof serious accidents have already happened.

Mr. Bartlett, a parishioner of sixty years' standing, stated, that he had seen a horse and van forced into a cottage door opposite the west corner, and a lady knocked down there. The evidence goes to shew that the proposed alteration is most urgent for the safety of the traffic, and that the only way of securing that safety is by the granting of the faculty asked for. It also appears that this alteration is necessary for the safety of parishioners going to and from their parish church, as the only entrance to it is from this part of the road. The result of my inspection of the road and neighbourhood is confirmatory of the correctness of this evidence, which has been left uncontradicted by those who are opposing the faculty.

The questions of law which arise in this and similar cases are two: First, whether in the case of a churchyard closed for burials an Ecclesiastical Court has a discretionary power to make any order of the kind asked for; and, secondly, whether, if the Court has such power, the making of the order upon the facts proved would be a discreet exercise of it.

As to the first question, the Court would observe, that this churchyard was separated and set apart by a sentence pronounced by the bishop for the burial of the dead for all time to come, but that under the Order in Council closing it for burials it is prohibited from being used generally for this purpose. The Court would also observe, that the effect of such a sentence was to place it under the exclusive jurisdiction of the Ecclesiastical Courts, and to vest in those Courts a discretionary power to make such orders respecting it as circumstances might from time to time require. Thus, it is competent for an Ecclesiastical Court, when the circumstances of a parish require a church to be enlarged, a new vestry to be erected, or a footpath to be made in a churchyard to facilitate access to the church, or through the churchyard for general convenience, to give effect to any of these objects by faculty, and to order the removal of remains, under proper sanitary precautions, from the required site to another part of the churchyard.

In the exercise of this discretionary jurisdiction, Sir Robert Phillimore, in the Arches, authorized the erection of a church school on an unused portion of a closed churchyard, thereby reversing a judgment delivered by Dr. Robertson, as Chancellor of Rochester, who held that he was precluded on the authority of the cases cited from granting the faculty: *In re Bettison*

(1) 5 Jur. (N.S.) 275.

(2) L. R. 4 Q. B. 407.

the Court is asked to sanction the appropriation, not of consecrated ground in which interments can lawfully take place, but

(Law Rep. 4 A. & E. 294). The principle to be observed by ecclesiastical judges in granting such faculties is thus laid down by Sir John Nicholl in the Arches: "Faculties are to be granted at the discretion of the ordinary, but it must be a sound discretion having a due regard to times and circumstances, and to the rights and interests of all parties concerned; if an unsound discretion be exercised, the party may appeal to a superior tribunal": *Butt* v. *Jones* (2 Hagg. Ecc. 424).

There is no statute or ecclesiastical canon that places any limit on the exercise of this discretionary jurisdiction. There are decisions by which appellate judges have refused to sanction its exercise in certain cases, under certain circumstances, and in some of these decisions there are to be found obiter dicta apparently limiting its exercise in cases not then before the Court of Appeal.

From the cases it is clear that there are some dealings with a churchyard which an Ecclesiastical Court would not be justified in authorizing, such as the erection on it of a shop, or a dwelling-house intended to be let for profit; and Sir William Wynne and Dr. Lushington in the Arches refused to sanction portions of a country churchyard being thrown into a highway: see *Harper* v. *Forbes* (5 Jur. (N.S.) 275), adding that such appropriation could only be effected by statute.

It is, however, to be observed that in these cases the churchyards were not closed, but in actual use for burials, that they were situated in the country, that there was no reason shewn why the road should not have been widened by the appropriation of unconsecrated ground taken from the opposite side of it, and that it did not appear that the enlargement of the highway was necessary for the safety of persons resorting to the church, or for that of the general public passing along it. Moreover, at the date of these decisions the cost of enlarging churchyards was thrown upon the church-rates, and there would be objections to this additional burden being imposed upon the church-rates by the granting of such a faculty.

Under such circumstances these learned judges might well conclude that the alteration they were asked to sanction was outside their discretionary power; but as the present case differs from those cases in most material circumstances, I am of opinion that the expressions referred to in these decisions are not in point.

The obiter dicta relied on are open to the further observation, that whilst an Appellate Court may hold that, under the circumstances of the case under appeal, the discretionary power has been wrongly exercised by the Court of First Instance, it is not competent to it by an obiter dictum to limit the discretion of Courts of First Instance in cases where the facts are different.

Faculties authorizing strips of closed churchyards to be used in cases of necessity as part of a public road have now been repeatedly decreed in the Consistory Court of London for the last twenty-five years, with a view of facilitating and avoiding danger in the traffic in crowded parts of the City and elsewhere.

The first faculty of the kind in the case of *St. Mary-le-Strand* was issued

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of consecrated ground in which burials are prohibited, and where at no time has there been even one interment. In the *St. John's*, in the Consistory Court of London by my learned predecessor, Sir Travers Twiss. The case is not reported; but on a similar application being made to me in 1873 in the same Court, in the case of *St. Mary Abbotts, Kensington*, I ascertained from Sir Travers Twiss that the faculty in the former case had been decreed by him with the approval of the late Bishop of London, and after deliberation, he being of opinion that the considerations which had influenced the judges in the cases cited were inapplicable to churchyards that had been closed for burials, when the alterations were requisite for the public safety and could not be otherwise practically obtained—I accordingly decreed a faculty in that case, and my reasons for so doing are reported in my volume of Consistory judgments, p. 17. They are more fully reported in the case of *The Vicar and Churchwardens of St. Botolph, Aldgate* v. *The Parishioners* ([1892] P. 161), cited by Mr. Boxall.

These precedents have been generally followed by the chancellors of other dioceses with some few exceptions. My learned predecessor in this Court, Chancellor Wintle, influenced by the expressions I have referred to in the cases in the Arches, refused a similar application in the case of a closed burial ground in the parish of St. Mary-in-the-Castle, Hastings. In August last the vicar and churchwardens of the same parish, in conjunction with the mayor and corporation of Hastings, renewed an application before me for such a faculty on evidence that since the refusal a lamppost at the corner of the burial ground had been knocked down three times by vans, and owing to the dangers of the road in consequence of its narrowness many of the parishioners were being prevented from attending evening service at their parish church, and that a man, who was carried into Court, had recently met with a most serious accident on the spot. Upon this evidence I decreed the faculty.

Faculties of this description having been granted during the last twenty-five years by the Consistory Court of London without appeal, the practice of the Court is to adhere to such precedents until they have been reversed on appeal. It is my duty, therefore, to adhere to this practice in London; and in other dioceses of which I am Chancellor until it has been overruled by a superior Court.

The second question for the consideration of the Court in this case is, whether upon the evidence before it, the granting of the faculty asked for would be a discreet exercise of the discretionary power vested in it. I am of opinion that it would; and the Court therefore decrees the faculty as prayed subject to the provision that the remains to be removed shall be reverently reinterred in vacant parts of the churchyard, or, if the families interested prefer it, in the parish cemetery; that the families interested shall have liberty to superintend by themselves or their agents the removal of the remains, and of selecting the site of their reinterment; that Miss Mawn be at liberty to remove the remains of the members of her family to the churchyard of Leighton in Shropshire, and that the families have the same right of interment in the new brick graves as was reserved to them in their present graves by the Order in Council. Mr. Prince, who has appeared as solicitor for several families interested in graves to be disturbed,

Walbrook, Case (1), where Dr. Lushington, sitting in the Consistory Court of London, did refuse to grant a faculty for turning a strip of the churchyard into the adjoining highway, it is clear both from the terms of the application and the evidence that the churchyard was still used for burials; and such must have been the case in the earlier precedent referred to by Dr. Lushington as having happened in Sir William Wynne's time. In *Reg.* v. *Twiss* (2) the faculty, the granting of which it was sought to prohibit, was a confirmatory faculty for works already done, and the prohibition was refused on grounds immaterial to the present case; whilst in *Harper* v. *Forbes* (3), not only was it proved that remains had been disturbed, but the only point really decided was that it was an unlawful act to interfere with a churchyard without the sanction of a faculty.

[He also referred to *In re Bettison* (4); *In re St. George-in-the East.* (5)]

THE CHANCELLOR. This is a motion by which I am asked to issue citation on a petition of the vicar and churchwardens of the parish of Plumstead, in the diocese of Rochester, for a faculty to permit a strip of the churchyard of the parish to be thrown into the public highway running outside the churchyard. I felt doubt as to the jurisdiction of this Court to grant such a faculty, and therefore desired the citation to be moved for in Court in order that I might have the advantage of hearing counsel on the point. The practice of the Ecclesiastical Courts is to determine a question of this sort on a motion for citation, rather than at a later stage, so as to prevent unnecessary expense and delay, and, in case of the Court deciding against the petitioners, to give them the earliest opportunity of appealing if they think fit to do so.

The actual question for decision is whether this Court can

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will be entitled to his costs from the petitioners.

Solicitor for petitioners: *C. A. Woolley.*

Solicitors for opponents: *Prince & Plumbridge.*

(1) 2 Roberts. 515; 16 Jur. 645.
(2) L. R. 4 Q. B. 407.
(3) 5 Jur. (N.S.) 275.
(4) L. R. 4 A. & E. 294.
(5) 1 P. D. 311.

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grant a faculty for the purpose of authorizing the use of a portion of a consecrated churchyard as a highway. If I have jurisdiction to grant such a faculty, I conceive that I ought to issue citation. The question would then be whether I ought in this case to exercise that jurisdiction; and that question can most conveniently be decided when the facts are fully before the Court at the hearing. But if I have no jurisdiction to grant such a faculty, I ought to refuse citation.

Consecrated ground is ground separated and set apart from all common, profane, and secular uses whatever and dedicated to ecclesiastical purposes for ever by the definitive sentence of the Spiritual Court, which according to English law has jurisdiction, with the consent of the owner of the land consecrated, to issue such a sentence. A definitive sentence is final, and cannot be revoked or recalled even by the authority which promulgated it. From very early times ground once consecrated has been held to be permanently subject to the conditions imposed by the sentence of consecration. It cannot be used for any secular purpose, and the preservation of its sacred character is placed under the protection of the ecclesiastical authorities. So well recognised and enduring are the disabilities of consecrated ground, that where it becomes necessary to use the site of a church or a churchyard for secular purposes an Act of Parliament is requisite. Many such Acts exist.

These observations relating to all consecrated ground are, of course, applicable to a consecrated churchyard. It can only be used for ecclesiastical purposes. Its primary and chief uses are (1.) as a burial-place, and generally (2.) as a garth surrounding and providing access to the parish church. I shall have occasion to mention presently, when I deal with the authorities, that there are many other uses to which land in a churchyard may be legitimately put without desecration.

Paths or roadways are necessary to a churchyard (1.) as a means of access to the church, and (2.) as a means of access to the different portions of the churchyard and the graves therein. The Ordinary, in whom, as I have said, is vested the care of churchyards, has power by faculty to arrange and alter such paths and roadways so as to make them answer their proper

purposes. That is a mere matter of internal management. The Ordinary is the regular authority to determine how the ground can be used to the best advantage for the purposes stamped on it by law, and, so far as the Ordinary is concerned, indelibly stamped on it.

Many churchyards are traversed by public footpaths which neither provide access to the church nor are useful for access to graves, but which nevertheless are legal footpaths existing by prescriptive right, and incapable of being interfered with by the Ordinary. How such paths when not churchways (that is, ways leading to church) originated it is not always possible to say. Sometimes, perhaps, the footpath was there before the churchyard; but, however that may be, I take it that all paths of this sort, neither beginning nor ending in the churchyard, but merely crossing it as if it were a field, so far as they have a legal origin, are prescriptive. I am not aware of any authority except certain modern dicta for the grant of a faculty for such a footpath; and it seems to me that unless the footpath is needed in connection with the use of the church or churchyard for their proper ecclesiastical purposes, it would be an application of part of the churchyard to a secular, and therefore an unauthorized, purpose.

The same observation applies with even greater force to a proposal to throw a strip of the churchyard into a high road so as to widen it, and with that object to alter the boundaries of the churchyard. It is a direct application of consecrated ground to a secular purpose, and, as it seems to me, equally so whether the freehold is purported to be given up, or only the right of user of the land as part of a highway. I do not think an attempt to retain on paper, as it were, the Ordinary's jurisdiction over the land after it has been turned into the highway can affect the substance of the transaction, which is the user of the land for a secular purpose. Nor can I attach weight to the argument put forward in this case by the amendment now made of the petition (it was not in the petition originally) that, as the widening of the highway will be convenient to the parishioners attending church, as well as to the rest of the Queen's subjects using the highway, therefore the alienation of a portion of the churchyard,

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and a consequent alteration of boundary walls so as to put this portion outside the churchyard, are defensible as an application of consecrated ground to ecclesiastical purposes. The road to be widened is at a considerable distance from the church, and does not lead directly to it, and there is no entrance to the churchyard from the road to be widened. The Court must look at the substance of the matter rather than its accidents, and where the main feature of the scheme is the widening of a high road, the proposal must be justified, if at all, as a proposal for this purpose. There is another reason why a scheme of this sort cannot, as it seems to me, be regarded as in effect merely a special method of arranging or laying out the churchyard so as to give convenient access to the church. It is the duty of the ecclesiastical authorities to see that a churchyard is properly fenced and its boundaries maintained (Canon 85). (1) But how can that obligation be fulfilled if the Court by faculty so alters the boundaries as to leave a portion of the churchyard outside, and physically indistinguishable from the rest of the highway?

I now turn to the authorities, of which there are several, and, with the exception of some recent cases in the Consistory Court of London, which I will refer to later, they are clear and all one way. They seem to me to establish two propositions:—

(1.) That a portion of a churchyard may not legally be used either for enlargement of a highway or for any other secular purpose.

(2.) That the Ecclesiastical Courts have no jurisdiction to authorize such a user of consecrated ground, and therefore any faculty purporting to confer such authority on any person is bad. It is not a matter of discretion which one Court may properly exercise in a given direction at a particular time, and another Court may properly exercise in an opposite direction at another time. It is not a question of discretion at all, but a question of jurisdiction.

The first case which it is material to quote is *The Rector of St.*

(1) Canon 85 of 1603 provides as follows: "The churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired. . . . The like care they shall take, that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth: . . ."

George's, Hanover Square v. *Steuart* in 1740. (1) The case is very briefly reported; but it appears that, a faculty having been applied for to allow the erection of a "charity school" on the churchyard, a prohibition was granted on the ground that the Ecclesiastical Courts could not grant such a faculty.

In *The Rector and Churchwardens of St. John's, Walbrook* v. *The Parishioners thereof and Others* (1852) (2), the application was for a faculty to permit part of the burial ground to be thrown into the highway. Dr. Lushington, as judge of the Consistory Court of London, on motion for citation, said: "I well remember that an application was made to Sir William Wynne, when judge of the Arches Court, to grant a faculty for converting a part of the churchyard at Ewell, in Surrey, into the public road requiring to be widened; and that learned judge refused the motion, stating that nothing short of an Act of Parliament could enable him to accede to the prayer. That dictum has been to my knowledge since acted upon, and I consider rightly, in several instances in the dioceses of London and Rochester; I must, therefore, refuse the present motion."

In *Campbell* v. *The Parishioners of Paddington* in 1852 (3) the same learned judge, while allowing a vestry to be built on a churchyard on the ground that "a vestry-room is employed for ecclesiastical as well as secular uses," laid down the law as follows: "When ground is once consecrated, no judge has power to grant a faculty to sanction the use of such ground for secular purposes."

There are several cases authorizing the erection in a consecrated churchyard of schools for religious teaching: *In re Bettison* (1874) (4); and of a mortuary as a temporary resting-place for the dead: *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (1878) (5); *The Vicar and Churchwardens of St. George's, Hanover Square* v. *Hall.* (6) In all these cases the faculties were granted, because the purposes were not, in the opinion of the Court, secular. Indeed, in *Hansard's Case* (5), the learned judge, Dr. Tristram, after stating that the appropriation of consecrated

(1) 2 Str. 1126.
(2) 2 Roberts. 515.
(3) 2 Roberts. 558.
(4) L. R. 4 A. & E. 294.
(5) 4 P. D. 46.
(6) 5 P. D. 42.

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ground for secular purposes is illegal, refused to grant a faculty for certain of the purposes desired, on the ground that, such uses being secular uses, he had no jurisdiction.

In *Harper* v. *Forbes* (1), in the Court of Arches in 1859, churchwardens were proceeded against for having, with the approval of the vicar, the rural dean, and the bishop personally, permitted a portion of the churchyard to be separated from the remainder of it and to be taken into a public road. Dr. Lushington at the outset of the hearing asked "whether it would be contended that he had authority to set apart consecrated ground for secular uses, or whether it was proposed to apply to him for a faculty to confirm what had been done. . . ." Counsel for the defendants replied in the negative; and then Dr. Lushington continued as follows: "I may therefore at once declare what I believe to be undoubted law, that it is not in the power of any Ecclesiastical Court whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation. From the earliest period that I have been acquainted with these Courts I have heard the law so laid down. It is singular that from a neighbouring parish to Reigate, namely, Ewell, an application was made to Sir W. Wynne, when Dean of the Arches, to grant a faculty for converting a part of the churchyard into a public road requiring to be widened, and he refused. Applications have several times been made to me sitting in the Consistory Court of London to permit minute portions of churchyards to be appropriated to secular uses; but I have always refused, because if I had allowed small portions of consecrated ground to be so used, I could not have rejected applications extending to the whole. In fact, it would be leaving the matter to the discretion of the judge, which would be contrary to law."

Nothing can be more emphatic than this very learned judge's statement of the law, not only that the Court ought not, but that it cannot grant such a faculty. So far as I am aware, there is no later reported judgment or dictum of Dr. Lushington which in any way qualifies his opinion expressed in the cases I have cited.

(1) 5 Jur. (N.S.) 275.

Lastly, in *Reg.* v. *Twiss* in 1869 (1), which was an application for a prohibition to stop a faculty to erect a workhouse and chapel on a consecrated burial ground, the prohibition was refused because it was not clear that the faculty would authorize more than the erection of the chapel, which of course was no desecration, and also because the applicant for prohibition was a stranger with no interest in the parish. But Chief Justice Cockburn expressed a very clear opinion on the point under discussion as follows:—

"At the same time I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character; and the cases before that learned judge and the case of *St. George's, Hanover Square* (2) are quite sufficient to affirm that as a general proposition."

I confess these authorities seem to me to establish that an application such as is before me to-day is outside my jurisdiction. And I should not have thought it necessary to go into the question so fully if it were not for three or four cases decided in the Consistory Court of London by the present Chancellor, Dr. Tristram, which seem to be inconsistent with the other authorities. The first is a case which, although decided in 1873, has, I think, only recently been published in a volume of Dr. Tristram's judgments: *The Vicar, &c., of St. Mary Abbots* v. *Parishioners, &c.* in 1873. (3) In that case, which was unopposed, a faculty was granted allowing a strip of the churchyard to be used outside the wall of the churchyard as a public footpath so long as it was required for that purpose. Some stress was laid on the increased convenience to persons attending church. The question of jurisdiction does not seem to have been fully discussed; but a then recent faculty was mentioned by the judge, by which part of St. Mary-le-Strand churchyard was allowed to be used as a highway. This last-mentioned case is, I believe,

(1) L. R. 4 Q. B. 407. (2) 2 Str. 1126.
(3) Tristram's Reports, p. 17.

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unreported, and was, I suppose, unopposed, and probably unargued.

But in a much more recent case, *The Vicar and Churchwardens of St. Botolph* v. *The Parishioners of the Same* (1), the same learned judge authorized the appropriation of a portion of a churchyard for widening a street. The faculty was opposed by a parishioner in person, and the learned judge delivered a considered judgment, in which he explained that although it had been contrary to the decisions of the Ecclesiastical Courts to sanction the curtailment of a churchyard used for burials "for the purpose of widening a public thoroughfare," he had many years before, at the instance of the then Bishop of London and some of the London vestries, reconsidered the matter, with the result that, in order to save the expense of obtaining special Acts of Parliament and to meet the needs of the day, it had become his practice to grant such faculties. Dr. Tristram states his view of the matter thus:—

"The principle upon which the Court holds that it has jurisdiction to grant such faculties is that there is a discretionary power vested in it as to making orders relating to churchyards; and that it is the duty of the Court to exercise this discretion reasonably, and, as Sir John Nicholl observes, 'to vary the exercise of it according to the change of times and circumstances, and that during the last twenty-five years there has been such a change of circumstances, owing to the great increase of traffic in the City and in other frequented parts of the metropolis, as to warrant the Court in granting such faculties for the convenience of those who attend church as well as for that of the general public."

The difficulty which I have in following Dr. Tristram's judgment—and I need not say I feel great hesitation and reluctance in not following it—is that the matter does not seem to me a matter of discretion, but of jurisdiction. I do not understand how change of circumstances can give this Court a jurisdiction which, twenty-five years ago, in the opinion of Chief Justice Cockburn and Dr. Lushington, it did not possess.

The third case is *In re St. Nicolas Cole Abbey* (2), in which the

(1) [1892] P. 161. (2) [1893] P. 58.

same learned judge, Dr. Tristram, went further, and allowed an electric lighting company to construct underground chambers for the purposes of their commercial undertaking in a City churchyard, and for the purpose of such construction to remove a considerable quantity of human remains. The company paid for the accommodation. The case is important as shewing the tendency of this new practice to develop. The learned judge in this, as in the preceding case, founds himself on a dictum of Sir John Nicholl, "that faculties are to be granted at the discretion of the ordinary." (1) That is a very important principle, which I do not, and of course cannot, question; but discretion must be exercised within the limits of the Court's jurisdiction, and I can only repeat that the difficulty here is to see the Court's jurisdiction.

I have carefully considered these recent decisions; but I confess I am unable to reconcile them with the earlier cases, some of which, at any rate, are decisions of the Court of Arches and binding upon me. No faculty of the kind now asked has ever been granted in this Court by me, or, so far as I know, by my learned predecessor, Dr. Robertson. Under these circumstances I must refuse to issue citation in this case.

Proctor for petitioners: *Moore.*

(1) See *Butt* v. *Jones*, 2 Hagg. Eccl. 424.

C. F. J.

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April 2, 3;
May 7.

[DIVISIONAL COURT.]

THE BLUE BELL.

Admiralty—Collision—Fog—"Fairway" of River—Duty to ring Bell when at Anchor—Bye-laws for Navigation of Thames, 1880, *art.* 13.

By art. 13 of the Bye-laws for the Navigation of the Thames, 1880, a vessel in fog, "when in the fairway of the river, and not under way, shall, at intervals of not more than two minutes, ring the bell."

The plaintiff's sailing barge, having anchored, on account of fog, above and inside the West Blyth buoy in Sea Reach, did not ring her bell at the above intervals. She was run into and damaged by the defendants' steamer, which, in the Court below, was found alone to blame for negligent navigation in fog:—

Held by the Divisional Court (Sir F. H. Jeune President, and Bruce J.), that the barge was also to blame, as she was within art. 13, and bound to ring her bell; for the word "fairway" means "a clear passage-way by water," and the barge was anchored in a part of the river where it is safe for vessels of moderate draught to navigate.

Appeal by defendants, the owners of the *Blue Bell*, against a decision of the judge of the City of London Court pronouncing their vessel alone to blame for a collision with the plaintiff's barge *Shield*.

The case is reported only on the question of the meaning of the word "fairway" in the regulations for the navigation of the River Thames. (1)

On October 11, 1894, the sailing barge *Shield*—of forty-nine tons register, drawing 5 ft. 10 in. forward and six feet aft, from the Medway to London, with a cargo of clay and two hands—anchored, on account of fog, above and inside the West Blyth buoy in Sea Reach in the River Thames. She veered out ten or

(1) Bye-laws for the Regulation of the Navigation of the River Thames approved by Order in Council, March 18, 1880:

"12. Every steam vessel (and) every sailing vessel navigating the river shall be provided with . . . an efficient bell."

"13. In fog, whether by day or night, the signals described in this rule shall be used, that is to say . . . .

"(c.) All steam vessels and all sailing vessels when in the fairway of the river, and not under way, shall at intervals of not more than two minutes ring the bell."

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eleven fathoms of chain cable, exhibited an anchor light, and occasionally, but at longer than the prescribed intervals, rang her bell. About 2.20 A.M. on October 12 she was run into and damaged by the *Blue Bell*, a steamship belonging to the defendants, of 344 tons register, from London to Antwerp with a general cargo, and drawing ten feet forward and 11 ft. 6 in. aft.

The learned judge in the Court below held that the plaintiff's barge was "out of the fairway of the river," and that all she was bound to do was to have her riding light up; that the defendants' steamship came out of the fairway, and was, "to use the language of the common law, a kind of trepasser," negligently navigating in fog.

Sir Walter Phillimore, and *J. D. Crawford*, for the appellants, the owners of the *Blue Bell*, contended that the barge was alone to blame, as she was in the "fairway"—that is, though not in the deep water channel, she was in a navigable part of the river, where vessels of light draught go in order to escape the tide, and, therefore, during the fog, she was bound to warn other vessels of her presence by sounding her bell in accordance with the regulations.

Pyke, Q.C., and *F. Laing*, for the respondent, the owner of the barge *Shield*, contended that the appellants' steamer *Blue Bell* was negligently navigating in fog at her own risk out of the fairway, and, on the question of the right of the barge to anchor where she did, cited *The Aguadillana* (1), and as to "fairway" being synonymous with "mid-channel," referred to the wording of art. 21 of the Regulations of 1884 for Preventing Collisions at Sea.

Cur. adv. vult.

May 7. The judgment of the Divisional Court (Sir F. H. Jeune, President, and Bruce J.) was delivered by

BRUCE J. The collision happened in the River Thames, near the West Blyth buoy, above and inside of the buoy—that is, between the buoy and the south shore of the river. The barge was at anchor, and the learned judge has held that, as the barge

(1) 6 Asp. M. L. C. 390.

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was inside the buoy, she was out of the fairway, and was under no obligation to ring a bell. The learned judge has also found that, as the steamship *Blue Bell* passed to the south of the buoy, "she was, to use the language of the common law, a kind of trespasser." He has decided that the steamship is alone to blame for the collision.

The appellants, the owners of the *Blue Bell*, contend that the barge was to blame for neglecting to comply with the provisions of art. 13 of the regulations governing the navigation of vessels in the River Thames. [The learned judge read arts. 12 and 13, and continued:—]

There is no express finding by the judge in the Court below that the *Shield* neglected to comply with the article last mentioned; all that he decided on this part of the case was that the *Shield* was not bound to ring a bell. We think, however, it may be inferred from passages in his judgment that he was not satisfied upon the evidence that those on board the *Shield* did at intervals of not more than two minutes ring a bell. It is of course a difficult matter for us, who have not heard the witnesses, to deal with a question of fact upon which there has been no express finding by the Court below; but we gather from the evidence of the master of the barge himself that her bell had not been rung for an interval of ten minutes before the collision. It is true that statements of witnesses respecting intervals of time are often far from accurate, and the mate of the barge, although he agrees with the statement of the master as to the time by the clock (2.10 A.M.) when the bell was last rung, says, he thinks that it was about two or three minutes before he heard the shouting from the *Blue Bell*. But neither the master nor the mate seems to have undertaken the duty of attending to the bell: the mate said that sometimes he attended to it and sometimes the master. In his deposition before the receiver of wreck the master stated that he or his mate had frequently visited the deck looking to the riding light and ringing the ship's bell. We think that the fair deduction from the whole of the evidence is that the master and the mate were below while the barge was at anchor, that one or the other came on deck at uncertain intervals, that the bell was rung only occasionally, and that it

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was certainly not rung for an interval of more than two minutes, probably more than ten minutes before the collision.

Then the question arises whether art. 13 of the Thames regulations applies; in other words, whether the barge was in the fairway of the river. In his deposition before the receiver of wreck the master of the barge described his position to be about 500 yards above the *Middle* Blyth buoy, and just inside. At the hearing he described the place as 400 or 500 yards above the *West* Blyth buoy, and inside about 200 yards. He marked the place on a chart produced to him; but whether he knew the exact position in which he was anchored is, we think, somewhat doubtful. The depth of water above and inside the West Blyth buoy is not inconsiderable, for some distance above and inside the buoy the depth of water at low water springs is not less than eighteen feet, and for more than a cable's length above and inside the buoy the depth is nowhere less than ten feet. When the barge *Shield* anchored, an hour and a half or two hours before high water, she anchored, according to the evidence of her master, in three fathoms. The barge *Sphere*, which drew five feet of water, was anchored forty or fifty yards inside of the *Shield*, and there was another barge (a light barge) anchored about fifty yards inside of the *Sphere*. The *Blue Bell* drew eleven feet six inches, and at the place of the collision there was certainly water enough for her at half ebb. All the facts stated in evidence seem to us to point to the conclusion that the *Shield* was anchored above and inside of the West Blyth buoy, but not so far inside as to be out of the navigable channel. That is to say, she was, we think, anchored in a part of the river where it is safe for vessels of moderate draught to navigate. The West Blyth and the Middle Blyth buoys mark the southern boundary of the channel commonly used by large vessels of deep draught; but they are put there simply as marks to indicate the extent of the deep water channel, and there is no regulation to forbid vessels navigating inshore of the buoys. There is a clear waterway inshore of the buoys into which sailing vessels of moderate draught when beating up or down the river occasionally stand, and even sailing vessels with a fair wind, and steam vessels such as the *Blue Bell*, when the tide is against them, pass inside of the

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buoys to cheat the tide. Now we are asked to find that the barge *Shield* when anchored, as we find she was, in a part of the waterway inside the buoys, where there is a clear passage, and where the smaller class of vessels not unfrequently navigate, was under no obligation to ring a bell in a fog. We need hardly say that neither reason nor convenience seems to favour such a conclusion. But of course we are bound by the Thames regulations, and we have only to determine the proper construction to be put upon the words there used. The question turns upon the meaning of the word "fairway." Was the *Shield* in the fairway of the river? The word fairway means, we think, a clear passage-way by water. Wherever there is an open navigable passage used by vessels proceeding up and down a river or channel, that may be said to be a fairway. We think that the meaning of art. 13 is that vessels when in any part of the river used for the passage of vessels shall in a fog, when not under way, ring a a bell. We think that the *Shield* was in the fairway, and that she was bound in compliance with art. 13 to ring a bell at intervals of not more than two minutes. She neglected this duty. If she had rung the bell as required by the article, we think that it is probable that the bell would have been heard by those on board the *Blue Bell* in time to have enabled them to take measures to have avoided the collision. We must, therefore, decide that the *Shield* is to blame.

The next question to be considered is, was the *Blue Bell* to blame? We do not think that she can be said to have been "a kind of trespasser," as found by the learned judge below. The buoys, as we have already said, are laid down as guides to navigation, and there is no regulation which renders it unlawful for vessels to pass inshore of them. Article 11 of the regulations governing the navigation of vessels in the Thames provides that "all vessels entering or being overtaken by a fog shall be navigated with the greatest caution and at a very moderate speed." According to the witnesses from the *Blue Bell*, the steamship was proceeding down the river dead-slow, when they came into a thick bank of fog, and the engines of the *Blue Bell* were stopped immediately, and the master of the *Blue Bell* gave orders to the second mate to stand by the anchor. According to the second

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mate of the *Blue Bell*, her engines had been stopped for ten minutes before the collision. The engineer of the *Blue Bell* was not called, and no reason seems to have been given for his absence. There is no express finding by the learned judge that the steamship was proceeding at more than a very moderate speed; but he expressed the opinion that as the *Blue Bell* cut into the barge three feet that that could not have been done with the impact of a vessel going only with the tide. We do not feel so confident on that point. The blow was a stem on blow, the tide was of the force of about two knots, and we are not prepared to say that a steamship such as the *Blue Bell*, 175 feet in length and laden with a cargo of 300 or 400 tons, might not if she came stem on with a speed of no more than two knots against a barge at anchor cut three feet into the timbers of the barge. But, in the view we take of the case, it is not necessary for us to determine this point.

The *Blue Bell* ran into the fog ten minutes or more before the collision. Indeed, from one answer given by the master of the *Blue Bell*, it would seem to have been a quarter of an hour before the collision that the steamship came into the fog. After consulting the Elder Brethren, we have come to the conclusion that there was no good reason why the anchor of the *Blue Bell* should not have been let go some considerable time before the collision. It would only have been an act of common prudence that the *Blue Bell* should at once have dropped her anchor when she came into the bank of fog. The case of the *Otter* (1) establishes that in a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. We think that the *Blue Bell* is to blame for continuing to proceed, even though at a moderate speed, after she entered the fog for a period of ten minutes or more. The neglect of the duty to anchor in a thick fog is a frequent cause of damage to property and loss of life, and we conceive it to be highly important in the interests of navigation that those who disregard the duty should bear the loss occasioned by their imprudence.

For the reasons we have given, we pronounce both ships to blame. There will be no costs to either party. No costs of the

(1) L. R. 4 A. & E. 203.

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cause by reason of the ordinary Admiralty rule. No costs of the appeal in accordance with the rule laid down in the *Hector*. (1)

Appeal allowed.

Solicitors for appellants (defendants): *Keene, Marsland, Bryden & Besant.*

Solicitors for respondent (plaintiff): *Ince, Colt & Ince.*

T. L. M.

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March 28, 29.

[IN THE COURT OF APPEAL.]

THE SATANITA.

Admiralty—Collision—Damages—Contract overriding Limitation of Liability —Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

The defendant entered his yacht for a race on the condition that "while sailing under the entry" he would obey and be bound by certain rules. By one of the rules the owner of any yacht, disobeying or infringing any of them, was liable for "all damages arising therefrom."

Whilst sailing under these rules, and in breach of one of them, the defendant's yacht, through improper navigation without the actual fault or privity of the defendant, ran into and sank another yacht.

The plaintiffs, the owner, master, and crew of the yacht which had been sunk, sued the defendant for the damage sustained by the collision. The defendant counter-claimed for a stay of proceedings on payment into court of a sum equal to 8*l.* per ton of the registered tonnage of his yacht with interest, as being the amount for which he was answerable under s. 54 of the Merchant Shipping Act Amendment Act, 1862:—

Held, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), that, at the material time, a contract existed between the owners of the competing yachts by which the defendant became liable for all damages arising from the infringement of the rule, and therefore (reversing the decision of Bruce J.) the defendant could not, as against the plaintiff, the owner of the yacht sunk, set up the statutory limitation of liability.

APPEAL by plaintiffs, the owner, master, and crew of the yacht *Valkyrie*, against a decree of Bruce J. pronouncing, in an action of damage by collision, that the defendant, the owner of the yacht *Satanita*, was entitled to limit his liability.

The material facts were:—

On July 5, 1894, about 10.30 A.M., the *Valkyrie* and the *Satanita*—registered cutters of 106 and 117·02 tons respectively

(1) 8 P. D. 218.

—were manœuvring to get into position for starting for the fifty-mile race for the Muir Memorial Challenge Cup, at the Mudhook Yacht Club Regatta, in the Clyde, when the *Satanita*, on the port tack, ran into and sank the *Valkyrie*, which was close-hauled on the starboard tack.

The entry, dated June 29, of the *Satanita* for the regatta was signed by the defendant, and contained the following clause: "I undertake that, while sailing under this entry, I will obey and be bound by the sailing rules of the Yacht Racing Association and the by-laws of the club."

The rules of the Yacht Racing Association, adopted by the club, provided among other things as follows:—

Rule 17: ". . . . Five minutes before the start the preparative flag shall be lowered, a blue peter hoisted, and a gun fired; after which the yachts in the race shall be amenable to the rules. At the expiration of five minutes exactly the blue peter shall be hauled down, and a second gun fired as a signal to start. . . ."

At the time of the collision the first gun had been fired and the yachts were awaiting the second gun.

Rule 18: "When two yachts are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.:—

"A yacht which is running free shall keep out of the way of a yacht which is close-hauled.

"A yacht which is close-hauled on the port tack shall keep out of the way of a yacht which is close-hauled on the starboard tack. . . ."

This is the same as art. 14 of the Regulations for Preventing Collisions at Sea, substituting "yacht" for "sailing ship."

Rule 24: ". . . If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht . . . she shall forfeit all claim to the prize, and shall pay all damages."

Rule 32: "Any yacht disobeying or infringing any of these rules, which shall apply to all yachts, whether sailing in the same or different races, shall be disqualified from receiving any prize she would otherwise have won, and her owner shall be liable for all damages arising therefrom. . . ."

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The plaintiffs, in an action in personam in the Admiralty Division of the High Court, charged the *Satanita* with a breach of rule 18, and alleged that by the terms of the entry and in consideration that the owner of the *Valkyrie* would race with the defendant under these rules, the defendant agreed that if the *Satanita* fouled the *Valkyrie* in consequence of her neglect of any of the rules, the *Satanita* would pay all damages, and that for the infringement of the rule the defendant had agreed to, and had, become liable to the owner of the *Valkyrie* for all the damages arising therefrom.

The defendant denied that he had entered into any such agreement as alleged and, by paragraph 4 of the defence (which by consent was treated as a counter-claim), alleged that: "if the said collision and damage was caused by the improper navigation of the *Satanita* which, for the purpose of this action only, the defendant admits to have been the case, the said collision and damages occurred without the actual fault or privity of the defendant, and he brings into Court the sum of 952*l.* 7*s.* 4*d.*, being the amount of damages in which the defendant is answerable under the statute in that behalf (1) calculated at the rate of 8*l.* per ton on the registered tonnage of the *Satanita*, including interest thereon at the rate of 4*l.* per cent. per annum from July 5, 1894, until payment into Court. . . ."

At the trial on December 18, before Bruce J., assisted by two of the Elder Brethren of the Trinity House, the evidence of the defendant, and of the master of the *Satanita*, shewed that, in

(1) The Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63):—

Sect. 54: "The owners of any ship . . . shall not, in cases where all or any of the following events occur, without their actual fault or privity. . . .

"(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship, or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of (such) loss or damage . . . to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships. . . ."

[This Act is repealed by the Merchant Shipping Act, 1894, of which the corresponding section is 503.]

accordance with the rules of the regatta (1), the *Satanita* was being steered by an amateur, and that the defendant, the owner of the yacht, though he was on board, took no part in the navigation. The plaintiffs thereupon abandoned the charge that the collision occurred with the actual fault or privity of the defendant, and the substantial questions raised were: whether, by the entry and racing regulations, a contract had been created between the owners of the yachts, and whether the contract, if any, was to pay all damages without regard to the statutory limitation of liability.

Bruce J. held that, even if there was a special contract, there was no evidence of any intention to waive the protection of the statute, and that the words "all damages" in the rules meant only such damages as could be recovered in the ordinary course of law, so that the defendant was entitled to limit his liability under s. 54 of the Merchant Shipping Act Amendment Act, 1862.

The plaintiffs appealed.

Sir Walter Phillimore, Joseph Walton, Q.C., and *Lauriston Batten,* for the plaintiffs, the owner, master, and crew of the *Valkyrie.* The defendant cannot claim the benefit of s. 54 of the Merchant Shipping Act Amendment Act, 1862, for, though it is not disputed that the yacht is registered as a British ship under the Merchant Shipping Acts, it is submitted that any statutory right of limitation the defendant might have had is ousted by special contract.

The effect of the defendant signing the entry of his yacht was to create a contract between the defendant, as a yacht owner, and the committee, rendering him liable to the committee for damage to property of the committee such as buoys, boats, or mark vessels, and further to create a contract between himself and all the yacht owners entering for that day, without regard to the particular race, rendering his yacht, if she neglected any of the

(1) According to the programme of the Mudhook Regatta it was a condition that:—

"Yachts to be steered by a member of the club, the Royal Northern, Royal Clyde, or Clyde Corinthian, Yacht Clubs, and, if any person not a member touch the tiller, or in any way assist in steering, the vessel will be disqualified."

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rules and thereby fouled another yacht, liable, under the 24th rule, to "pay all damages," and rendering himself—under the 32nd rule—"liable for all damages arising therefrom."

Analogous cases of contracts formed in this way, shewing that it is for the parties concerned to sue and not the committee, are: cases of mutual insurance associations, as illustrated by *Gray* v. *Pearson* (1), *Evans* v. *Hooper* (2); cases of restrictive covenants on the sale of an estate in lots: *Nottingham Patent Brick and Tile Co.* v. *Butler* (3); cases of composition deeds, and cases of undisclosed principals.

As by the terms of the special contract the defendant became liable to pay "all" damages, he thereby waived any right to limitation under the Merchant Shipping Act, for, if the words only mean "all damages recoverable by law," they are not required, as these could be recovered in any event. The owner of the *Valkyrie* claims under rule 32; and if s. 54 of the Merchant Shipping Act, which is confined to damage caused by improper navigation, is to be applied to restrict the meaning of the words "all damages" in that rule to 8*l.* per ton, then this inconsistent result will follow—that the same words when applied to the breach of a rule, not the result of improper navigation, must be read differently and mean what they say—"all damages." In other words, the contract between the parties is not cut down by the Merchant Shipping Act; it goes beyond and is outside that Act, which was not intended to apply to contracts of this nature, but rests on grounds of public policy to encourage the owning of sea-going British ships: see the recital to the Act of 53 Geo. 3, c. 159, limiting the shipowners' liability for damage by collision.

There is nothing unreasonable in this view, as, at such a regatta as the one in question, there are a number of yachts of all sizes collected together in a confined space, and for the particular race in which the accident occurred it was compulsory that the helmsmen should be amateurs. Yacht racing under such circumstances is notoriously dangerous, and each yacht owner may fairly look to the recovery of all damages consequent

(1) L. R. 5 C. P. 568. (2) 1 Q. B. D. 45.
(3) 16 Q. B. D. 778.

on disobedience to the rules by which all have agreed to be bound.

Sir R. E. Webster, Q.C., Pollard, and *G. C. Colville,* for the respondent (defendant), the owner of the *Satanita.* The defendant's yacht, a sailing ship registered under the Merchant Shipping Acts, broke the 18th rule of the Yacht Racing Association, which is equivalent to art. 14 of the Regulations for Preventing Collisions at Sea; and for the damage caused by such improper navigation, the defendant, by s. 54 of the Merchant Shipping Act Amendment Act, 1862, is not answerable in damages to an aggregate amount exceeding 8*l.* per ton of the *Satanita's* tonnage.

The positive provisions of the statutes limiting the liability of shipowners existed before any sailing rules were embodied into regulations for preventing collisions at sea. These rules have nothing to do with limitation of liability, and only amplify that practice of seamen, neglect of which, before the rules existed, was deemed evidence of negligence in the navigation of a sailing vessel. In respect of the consequences of that negligence, without the actual fault or privity of the owner, the legislature has thought fit to limit his liability—that is, his liability is limited in respect of "all damages wrongfully done by a ship to another whilst it is being navigated": *The Warkworth.* (1) There is no evidence that the defendant specially contracted himself out of the statute, and there is no consideration for any such contract. The rules of the Yacht Racing Association cannot make a contract between two owners of yachts. They do not address the plaintiff or defendant, but are the terms under which the committee allow a yacht owner to enter; at most, they amount to a contract between each yacht owner and the committee, that, if the committee has to pay damages, the yacht owner will be liable for those damages to the extent, in the case of improper navigation, of the limit provided by law, and will not dispute his legal liability on the ground, for example, that the person who did the damage was an amateur helmsman not his servant. But whether there is a contract or not, the liability is limited, and the words "all damages" in rule 24 must be

(1) 9 P. D. 145, judgment of Brett M.R., p. 147.

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construed according to the existing law and be read "any damages," just as the previous words "forfeit *all* claim to the prize" must mean "*any* claim." So the special conditions in rule 32 cannot affect the statutory enactment, and the words "all damages" in that rule must also be read as "any damages" —that is, any damages recoverable by law, and by law the defendant is declared not to be "answerable in damages" beyond 8*l.* per ton. In an ordinary bill of lading there is no reference to the statute, but the liability of the shipowner is nevertheless limited. Assuming that there was a contract between the plaintiff and the defendant, still the provisions of the Act will override that contract, for the limitation is to be construed in favour of the shipowner: see per Coleridge C.J. in *Wahlberg* v. *Young.* (1)

In the case of the contract of suretyship the liability of the surety is restricted to the legal consequences; so a covenant for quiet enjoyment is not a covenant to indemnify against all persons, but only a covenant against persons having lawful title: *Nash* v. *Palmer* (2); so an undertaking to indemnify against *all* costs and charges and expenses in and about the formation of a company is only a covenant "to indemnify against *lawful* claims: per Cresswell J. in *Lewis* v. *Smith.* (3) In order that the general provisions of the Merchant Shipping Act may be overridden by a particular contract, the intention to do so must be manifest, or the implication be irresistible: *Conservators of Thames* v. *Hall.* (4)

Joseph Walton, Q.C., in reply. The question what the damages are in a case of collision arising from improper navigation is not affected by s. 54 of the Merchant Shipping Act, for, wherever there are more claimants than one, the actual damages each claimant has sustained by the collision are ascertained and assessed in full in the Admiralty Registry with due regard to the doctrine of remoteness of damage, and, if the fund prove insufficient, then only a percentage of those damages is paid out to each claimant, because under the statute "all" the damages are not recoverable. Under this contract, however, they are, and the damages

(1) 45 L. J. (C.P.) 783, at p. 785.
(2) 5 M. & S. 374.
(3) 9 C. B. 610.
(4) L. R. 3 C. P. 415.

are not confined to the consequences of improper navigation, but extended to the consequences of breaches of such rules as relate to not crossing the starting-line too soon, or giving way as the outside yacht, &c., some of which rules, though they conflict with the ordinary rules of navigation, are nevertheless binding on all yachts taking part in the regatta, and if broken, entail as a consequence a liability to "all" the damages arising therefrom.

LORD ESHER M.R. This is an action by the owner of a yacht against the owner of another yacht, and, although brought in the Admiralty Division, the contention really is that the yacht which is sued has broken the rules which by her consent governed her sailing in a regatta in which she was contesting for a prize.

The first question raised is whether, supposing her to have broken a rule, she can be sued for that breach of the rules by the owner of the competing yacht which has been damaged; in other words, Was there any contract between the owners of those two yachts? Or it may be put thus: Did the owner of the yacht which is sued enter into any obligation to the owner of the other yacht, that if his yacht broke the rules, and thereby injured the other yacht, he would pay damages? It seems to me clear that he did; and the way that he has undertaken that obligation is this. A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgated certain rules, and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is, that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you, that if by a breach of any of our rules you do damage or injury to the owner of a competing yacht, you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners. There are other conditions with regard to these matches which constitute a relation

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between each of the yacht owners who enters his yacht and sails it and the committee; but that does not in the least do away with what the yacht owner has undertaken, namely, to enter into a relation with the other yacht owners, that relation containing an obligation.

Here the defendant, the owner of the *Satanita*, entered into a relation with the plaintiff Lord Dunraven, when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that if, by any breach of any of these rules, he did damage to the yacht of Lord Dunraven, he would have to pay the damages.

Now the defendant admits that his yacht, the *Satanita*, broke the rules. It is not material at present to consider which rule was broken, but, as a consequence of breaking the rule, his yacht ran into Lord Dunraven's yacht and sank it. That is conceded. Now comes the question, What damage is he liable for? He had entered into a relation with Lord Dunraven under these rules. It is quite a different relation from that which exists between the two owners of two ships sailing on the ocean, for the only relation which exists between the two ships is that, by reason of their contiguity on the ocean, one of them shall not by negligence run into the other. Rules grew up, known to all sailors, long before the statute was passed, which, amongst other things, held that any ship which violated those known rules was acting negligently towards the other ship, but the only relationship existing was that she was not to do her any injury by negligence.

This is a relation which arises from two things or persons being contiguous to each other; for if you choose to drive a tandem across Salisbury Plain as fast as you like and sway it about from one side to the other, you are doing no harm to anybody if there is nobody else on Salisbury Plain; but if there is somebody else on Salisbury Plain, so near to you that by reason of your contiguity you are likely to run into him and damage him, then there arises a duty upon you not to be negligent, but to drive with reasonable care so as not to run into him.

So it was with a ship on the sea. She may go round and

round in a circle and sail in any way she pleases if there is no other ship near her. But the moment there comes another ship so near to her that, if she navigates without due and reasonable regard for the other ship, she may injure her, then the relative duties immediately arise. Besides those duties which by universal custom determine what would be negligent steering or sailing, the Act of Parliament was passed which stated that when two sailing ships are approaching one another so as to involve risk of collision then each of them is to do certain things. Those rules do really fix what under those circumstances will be negligence, unless the rules are broken by reason of inevitable accident.

With regard to the rules governing this particular regatta, the committee could not make any rule which would affect ships which were not going to take part in this regatta. I cannot agree with counsel for the defendant that a vessel coming up or down the Clyde would be bound to take notice of the rules of this regatta. They have nothing to do with them. They are entitled to sail in and out according to the usual mode of navigation. They ought not to sail according to these rules, even though they knew that the regatta was being held, and even although they knew all the rules of the regatta they would not be bound to observe them. On the contrary, they ought to observe the ordinary rules of navigation. If, whilst they are so sailing, they do interfere with the regatta, it will be for the yachts sailing in the regatta to take care of themselves and observe the ordinary rules of navigation with regard to these vessels which are not sailing under the regatta rules, and if that spoils their match it cannot be helped. But vessels taking part in the regatta have undertaken an obligation to each other which is this, namely, Whether what you do is, or is not, contrary to the ordinary rules of navigation, if it is contrary to these rules, I have agreed with you, and you have agreed with me, that we shall both observe these rules, otherwise you cannot have any claim against me under these rules, and if I do that which is a breach of these rules, you can have a claim against me in respect of the breach of these rules.

There are some of these rules, as has been pointed out, which

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alter the ordinary rules of navigation between these parties who have agreed to sail according to these altered rules, and if one of them breaks these altered rules, he is, by these rules, to have a claim maintained against him. Then comes the question, What is that claim?

We have to construe the rule which is applicable in this case, and that is rule 32.

I know that the plaintiff has relied in a sense upon rule 24; but I think the governing rule in this case is rule 32, which runs as follows: "Any yacht disobeying or infringing any of these rules, which shall apply to all yachts, whether sailing in the same or different races"—I do not construe that part of the rule, because I do not think it is material—"shall be disqualified from receiving any prize she would otherwise have won"—that condition by which they have agreed with the committee, the persons who give the prizes, that they shall be disqualified from receiving any prize, does not affect the owners of other yachts. Now we come to this: "And her owner shall be liable for all damages arising therefrom." Can that mean an obligation which they have undertaken to the committee?

If a yacht runs into one of the other yachts, as was done on this occasion, how can that damage the committee? The committee have no interest in the yacht, they have not to pay for the loss of the yacht, and have nothing to do with the yacht, except that they have allowed her to run in the race for a prize; and if she won the race the committee has entered into an obligation to give her a cup, or money, or whatever it might be; but the committee is not damaged, and cannot be damaged. Then who has the right to claim those damages? It seems to me clear that it is the owner of the yacht which has been sailing against this yacht, or at all events in the regatta. You must read in "to any other yacht which he may damage" for "all damages arising therefrom." If rule 24 is looked at, it seems to me to make it clearer that that must be the meaning, because it says: "If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht"—that is the thing which does the injury to the other yacht owner—"she shall forfeit all claim to the prize, and shall pay all damages." What meaning are we

to put upon those words, "all damages"? If it had been "shall pay damages" it would have been a futile rule, because if the rule was broken negligently the yacht owner would be liable to damages. Why is the word "all" put in? Nobody has been able to suggest any meaning to this word "all" except that it must be all the damages caused by the fouling. All the damages to whom? All the damages to the owner whose yacht has been injured. To my mind it is plain and clear. It is all damage caused to the owner of another yacht by reason of an injury having been done to that yacht. On the other hand, as the liability is for injury done to the yacht, if a yacht owner is going to make a present of valuable jewels to a lady after the race is over, and has the box containing them on his yacht at the time, or is allowing a lady to be on board during the race, with boxes of dresses or jewels or the like, I have no doubt that the loss of those jewels or dresses would be a thing which the other party could not contemplate as a possible result of what he was doing, and therefore he would not be liable.

I cannot see how to construe that word "all" without saying that the effect of it is clearly to do away with the limitation contained in the Merchant Shipping Act; and although it cannot be denied that this limitation, if it were not for these words of the rule, would apply, it is a mere accident, for the Merchant Shipping Act was not intended to apply to all yachts, and certainly not to racing yachts, and they are only brought in by the section in this Act defining what ships are to be considered as within the statute.

It is always agreeable to think that a rule which one feels obliged to lay down can have a reasonable foundation, and I think it can in this case.

The yachts under these rules are to be steered by amateurs. The yachts which come in to compete do not know what yachts are coming against them, and therefore cannot possibly know the sailor-like capabilities of the owner of a yacht, or of his amateur friend. Then they are not in the condition that they would be if the yachts were to be sailed by a master, and therefore have not that protection that the yacht is going to be steered and sailed by a capable sailor. Here the yacht may be in fault

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by reason of the incapacity of a person as to whose capacity the other yacht owners have no means of judging. I think, therefore, it was very reasonable, to say that if you do enter into such a game as this to be played by an incapable person, if he does commit a fault to the injury of the other, you must pay all the damages, and not be limited either to 8*l.* or to 15*l.* a ton, otherwise, although you might have a most valuable yacht, if she were sunk by another yacht of a very small tonnage, there would be no real remedy at all. Those reasons seem to me to make the rule a most reasonable protection against gentlemen who will have their little gambol with their yachts, and I have a strong conviction that the interpretation which we are proposing to put upon it is reasonable and right, and I think, therefore, that this appeal must be allowed.

LOPES L.J. If we were not differing from the learned judge below, and if this were not important in the sense of involving a large amount of money, I should not think it necessary to deliver any judgment of my own, as I should be prepared to adopt the judgment of the Master of the Rolls; but in the circumstances I will shortly express my view of this case.

The questions are, first, was there a contract? Secondly, what was the contract? Now it is admitted that the *Satanita* and the *Valkyrie* had been entered for the fifty-mile race in the regatta of the Mudhook Yacht Club on the Clyde, that they had respectively agreed to obey the rules of the Yacht Racing Association, that the yachts had become amenable to those rules, that the *Satanita* violated one of those rules, and that it was the 18th rule which was violated. [The learned judge read the rule, and continued:—]

We therefore start with this, that rule 18 was infringed, and that the owners of both these yachts adopted these rules, and, in point of fact, sailed their yachts under them.

As to the first question, I have no doubt that there was a contract. Probably a contract with the committee in certain cases, but also a contract between the owners of the competing yachts amongst themselves, and that contract was an undertaking that the owner of one competing yacht would pay the

owner of any other competing yacht injured by his yacht all the damages arising from any infringement or disobedience of the rules.

In my opinion, directly any owner entered his yacht to sail, this contract arose; and it is clear that the owners of the *Valkyrie* and the *Satanita* did enter their respective yachts and did sail. Therefore, there was a contract, and under rule 32 damages became payable; but it is said that the damages are limited under the Merchant Shipping Act. In order to decide that, we must look at rule 32; for, though I do not overlook rule 24, I base my judgment on the meaning of rule 32. [The learned judge read the rule, and continued:—] It is said by counsel on behalf of the *Satanita* that that means all legal consequences—all damages recoverable by law—and therefore only means damages limited by the Merchant Shipping Act. If that is the true construction of the rule, I can see no necessity for the insertion of the words "all damages arising therefrom," because the damages limited by the Merchant Shipping Act would have followed; and this anomaly would also arise, that there would be damages of one kind when there was improper navigation, and damages of another kind if the injury was caused otherwise than by improper navigation. I cannot, therefore, agree with that construction of the rule, nor understand why we are not to give full effect to the words "all damages arising therefrom." Any other construction would, I think, be contrary to the true meaning of these words. It is said that the words must be given their ordinary meaning, unless the giving of that meaning leads to an absurdity. Does giving that meaning to the word "all" lead to absurdity here? On the contrary, I think that that word "all" was used deliberately and for a purpose. These yachts were not to be steered by a professional steersman, but by amateurs, and it was natural, in those circumstances, that the owner of one yacht should not be exposed to the great risk which might arise to his yacht by reason of another yacht being steered, it may be, by an incompetent steersman, of whose competency the owner of the other yacht had no knowledge. It seems to me to be a reasonable ground for introducing this word. It cannot, therefore, be said that the

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construction which we propose to give the words leads to an absurdity.

The case was suggested by counsel for the *Satanita* of a lady falling into the water and damaging her dress. It is said that, if we give this large construction to the word "all," we should be including a case like that; but the lady would not be a party to this contract, and therefore could not recover under this rule. I am of opinion that the judgment of the learned judge in the Court below must be reversed.

RIGBY L.J. I am of the same opinion, and, out of deference to the learned judge, will shortly state my reasons.

The first question is that of contract or no contract. It appears to me that all that is necessary to constitute a contract between the yacht owners is to bring home to each of them the knowledge that the race is to be run under the Yacht Racing Association rules, and that they, the one and the other, deliberately enter for the race upon those terms. In this case we have a written document, signed by each yacht owner, which, if there were any doubt at all, would render it abundantly clear that he was perfectly well aware of the bargain he was entering into. In no other way than that does it appear to me to be material.

The contract did not arise with any one, other than the managing committee, at the moment that the yacht owner signed the document, which it was necessary to sign in order to be a competitor. But when the owner of the *Satanita* on the one hand, and the owner of the *Valkyrie* on the other, actually came forward and became competitors upon those terms, I think it would be idle to say that there was not then, and thereby, a contract between them, provided always that there is something in the rule which points to a bargain between the owners of yachts. Under rule 24, "If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize, and shall pay all damages." To whom is the owner of that yacht to pay those damages? He cannot pay them to the club, nor do I think the club could recover them. The true and sensible construction is that he must pay the owner of the yacht fouled.

Under the 32nd rule a breach of any of the rules renders the owner liable for "all damages arising therefrom." I am prepared to acquiesce in the suggestion that those words must be treated according to their ordinary meaning; but there can be no doubt that the ordinary legal meaning of damage includes damage to a vessel sent to the bottom. The argument that if we give the full meaning to the words "all damages" we may be including damages which are remote, is, I think, removed by the fact that this is damage clearly within the ordinary meaning of the law.

As to the limitation under the Merchant Shipping Act, if the damage does not amount to the limit, it is paid in full, and all that the section says is, that under certain circumstances the owner of the ship in default shall not be answerable in damages beyond a certain amount. If we were dealing with that class of case here we should have to apply the section to the case of yachts; but when we come to the actual contract entered into, what can be clearer than the meaning of the word "all"? "All damages arising therefrom." It means what it says. To get out of that meaning you must introduce a great deal more than the argument for the defendant would allow. You must say damages, which would be the legal consequence if there were no such contract as we are now dealing with. On the whole I am of opinion that the parties who drew up these rules intentionally put the words in, and that the yacht owners contracted themselves out of that accidental benefit which was given to them by the Merchant Shipping Act. I agree that the judgment below must be reversed.

Appeal allowed. (1)

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendant: *Thomas Cooper & Co.*

(1) By the decree of the Court of Appeal (settled May 31), the Court reversed the decision of Bruce J., so far as it pronounced that, as against the plaintiff, the owner of the *Valkyrie*, the defendant was entitled to limit his liability. As regarded the master and crew of the *Valkyrie*, the Court dismissed their appeal without costs.

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Feb. 28; *April* 29, 30; *May* 1.

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Admiralty—Salvage—Practice—Consolidation of Actions—Conduct of Cause—Agreement to Tow for Half-an-Hour for fixed Sum.

The defendants' steamship, valued with cargo and freight at 43,748*l.*, broke down in the South Atlantic, and her master, in the expectation of getting the engines again to work, signed an agreement with a passing steamer (the first salvors) to pay 500*l.* for half-an-hour's towage. Just after the expiration of that period the hawser broke, killing the chief officer of the first salvors, injuring two other persons, and doing damage.

The first salvors thereupon declined to render any further assistance, and, the attempt to get the engines to work having proved unsuccessful, a French mail steamer (the second salvors), which had in the meantime come up, towed the defendants' vessel 255 miles to a place of safety.

The first and second salvors commenced separate actions, and the defendants applied to consolidate:—

Held, by Bruce J., that in the exercise of the discretion of the Court the actions must be consolidated on the ground of convenience and economy, without regard to the consent of the parties. The practice indicated in the *Jacob Landstrom* (4 P. D. 191, 193) dissented from.

At the trial the defendants objected that no salvage services were rendered by the first salvors, that the towage was without benefit, and the sum claimed exorbitant:

Held, by Bruce J., that the agreement was not manifestly unfair or unjust, and, therefore, though the defendants had derived no benefit, the stipulated service having been performed, the first salvors were entitled to the agreed sum of 500*l.*

ACTIONS OF SALVAGE.

The plaintiffs were the owners, master, and crew of the steamship *Hawkhurst*, and the owners, master, and crew of the steamship *Medoc*; the defendants were the owners of the steamship *Strathgarry*, her cargo and freight.

On November 1, 1894, the *Strathgarry*, a screw steamship of 3264 tons net and 4992 tons gross register, with engines of 500 horse-power, was off the coast of South America on a voyage from Cardiff to Buenos Ayres with a cargo of coal, when her intermediate and high-pressure cylinders became disabled. During the three next days, whilst she was drifting in a southerly and westerly direction, her engineer endeavoured to get the engines to work with the low-pressure cylinder, and as he was very confident that if the propeller could be forced round so as

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to move the engines he would succeed in creating a vacuum and so be able to proceed under steam, the master of the *Strathgarry* at daybreak on November 5 boarded a passing steamer—the *Hawkhurst*, of 1538 tons net and 2340 tons gross register, with twenty-three hands, a general cargo, and four passengers from London to the River Plate—and explained his position. The master of the *Hawkhurst* offered to tow the *Strathgarry* to Rio. This was declined, and after the master of the *Hawkhurst* had demanded 1000*l.* for half-an-hour's towage, and then 750*l.* or arbitration, the master of the *Strathgarry* ultimately signed the following agreement: "I hereby accept your offer to tow the SS. *Strathgarry* for the space of half-an-hour for the sum of five hundred pounds sterling."

The towage commenced at 6.50 A.M., the *Strathgarry*, owing to her large size and the screw not revolving, sheering heavily. Just at the expiration of the half-hour the rope broke, and, the manilla spring attached to the hawser recoiling, killed the chief officer on board the *Hawkhurst*, seriously injured two other persons, and did damage to the skylights and steering-gear to the extent of 100*l.*

The efforts of the engineer of the *Strathgarry* to get his engines to work were unsuccessful, and the master of the *Hawkhurst* was asked to take the *Strathgarry* in tow again; but, on account of the loss of life and damage on board his ship, and the bad steering of the *Strathgarry*, he declined. In the meantime the French mail steamer *Medoc*, of 2648 tons net and 3571 tons gross register, engines of 350 horse-power nominal, and a crew of 50 hands belonging to the Compagnie des Messageries Maritimes, from Rio de Janeiro to Corunna, came up, and, after sending a surgeon to attend to the injured men on board the *Hawkhurst*, took the *Strathgarry* in tow, and brought her in safety a distance of 255 miles to Bahia.

In respect of these salvage services the owners, masters, and crews of the *Hawkhurst* and of the *Medoc* commenced separate actions, and on the application of the defendants, the owners of the *Strathgarry*, her cargo and freight, the assistant registrar made an order consolidating the two actions and giving the conduct to the solicitors for the *Hawkhurst*. The owners, master,

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and crew of the *Medoc* appealed to the judge in chambers, who, on account of the importance of settling the practice with regard to the consolidation of salvage actions, delivered judgment in court.

1895. Feb. 28. BRUCE J. [After stating the general nature of the two actions, the learned judge continued:—] I have come to the conclusion that I should affirm the consolidation order. It is quite true that different questions are raised in the two actions, but both actions relate to services rendered to the same ship, and both services commenced about the same period. The *Hawkhurst* was the first vessel to fall in with the *Strathgarry*, but the *Medoc* came up while the *Hawkhurst* was still in company with the *Strathgarry*. In both actions the degree of danger in which the *Strathgarry* was placed by reason of her disabled condition must form an element for the consideration of the Court, and both actions must to some extent depend upon the same facts.

The practice of the Court in consolidating salvage actions has never been limited to cases where the rights of the various claimants depend upon the same facts, or arise out of services of the same description. So much may clearly be gathered from the judgment of Dr. Lushington in *The William Hutt* (1) and from the judgment of Sir Robert Phillimore in *The Melpomene*. (2)

The matters which ordinarily lead the Court to order consolidation in salvage actions are considerations of convenience and economy.

Whenever the matters at issue in two or more actions arise out of services rendered to the same ship in relation to the same peril, it is ordinarily convenient to have the matter determined in one proceeding. Where actions are consolidated there is nothing to prevent parties who may have separate interests appearing by separate counsel, and any point in the case which may affect one or more of the parties apart from the others can as well be determined in a consolidated cause as in a separate action. There are certain formal steps which must be taken in

(1) Lush. 25. (2) L. R. 4 A. & E. 129.

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order to obtain the trial of an action, and if each of several sets of salvors is allowed to carry on to hearing a separate action against the same property, these formal steps must necessarily be taken in each action. But if the whole matter is brought before the Court in one proceeding, then it becomes unnecessary for more than one of the parties to incur the expense of the formal proceedings incident to the hearing; and the defendant, in the event of the costs of the cause being given against him, is not called upon to pay more than the single set of costs incurred in respect of these formal steps. It seems to me that convenience obviously points to the adoption of the procedure of consolidation whenever it can be done without injustice to rival claimants.

In the present case I think it is clear that the two sets of claimants must be entitled to appear by separate counsel; but as I have said, there is nothing in a consolidation order to take away that right, and I cannot see that any one will gain any advantage by neglecting to adopt a proceeding which will greatly lessen the formal costs of the hearing which would be incurred if the actions were not to be consolidated.

At one time there was an inclination to relax the old practice of the Court, and not to insist upon consolidation when it was objected to by one or other of the parties. It was for a time considered that, by the exercise of its power to condemn in costs a party who improperly refused to consent to consolidation, the Court would be able indirectly to prevent the parties being harassed by the unnecessary expense of double proceedings.

This seems to have been the view expressed by Sir Robert Phillimore in 1878, in the case of *The Jacob Landstrom.* (1) But I am informed that the experience gained in the Registry since that date has shewn that very great difficulty is experienced in enforcing this rule as to costs, whilst in many cases the disallowance of costs after they have been incurred has been felt to be a considerable hardship.

I believe it to be much better to adhere to the old practice, and to consolidate actions wherever it appears to be convenient

(1) 4 P. D. 191.

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to do so, without regard to the consent of the parties, and without holding out any threat as to costs.

The consent of the parties, which was all-important in the proceeding which was known as consolidation at common law, is not a governing factor in consolidation as practised in the Admiralty Court. At common law, what was known as consolidation was in effect an order to stay several actions pending the trial of one, on the terms that the defendants in the actions that were stayed agreed that, in the event of judgment being given for the plaintiff in the action which was tried, they would consent to a similar judgment being entered in the other actions. But consolidation in Admiralty means that the several causes shall be tried together as one case, and, as I have said, no other considerations than those of economy and convenience ought to influence the Court. There may be cases where the circumstances are of such a nature that it would be inconvenient and unjust to consolidate the cases, and in those cases the Court will, in the exercise of its discretion, refuse to consolidate, but when the actions may be conveniently consolidated without injustice to the parties, the Court ought not to be prevented from making the order for consolidation simply on the ground that the parties withhold their consent.

Then there was a question raised as to which of the plaintiffs should have the conduct of the consolidated case. It seems to me that the rule which has always been acted upon is that the principal salvor should be the salvor to have the conduct of the consolidated cause. I cannot doubt in this case that the owners, master, and crew of the steamship *Medoc* rendered the service which is the principal service, and I think I ought to vary the registrar's order to the extent of giving to them the conduct of the cause. As I have partly confirmed, partly varied, the decision of the registrar, I give no costs of the appeal.

Order affirmed as to consolidation; varied as to conduct; no costs.

The consolidated actions were tried on April 29 and 30, by Bruce J., assisted by two of the Elder Brethren of the Trinity

House, when it was contended, on the part of the defendants, that the *Hawkhurst* did not render any salvage services to the *Strathgarry*, that the towage was without benefit to that vessel, and that the agreement was exorbitant.

Sir Walter Phillimore, and *F. Laing*, for the plaintiffs, the owners, master, and crew of the *Medoc*.

Sir Walter Phillimore, and *Butler Aspinall*, for the plaintiffs, the owners, master, and crew of the *Hawkhurst*.

Aspinall, Q.C., and *Balloch*, for the defendants, the owners of the *Strathgarry*, her cargo and freight.

The values were: *Medoc* 40,000*l.*, cargo 50,123*l.*, freight 2326*l.*—total 92,449*l.*; *Hawkhurst* 30,000*l.*, cargo 20,000*l.*, freight 2000*l.*—total 52,000*l.*; *Strathgarry* 38,500*l.*, cargo 4234*l.* 13*s.* 2*d.*, freight 1014*l.*—total 43,748*l.* 13*s.* 2*d.*

[In addition to the case mentioned in the judgment, the following were referred to: As to the binding character of the agreement for 500*l.*: *The Alfred* (1); *The Renpor* (2); *The Prinz Heinrich.* (3) As to setting aside salvage agreements: *The Phantom* (4); *The Cargo ex Woosung* (5); *The Medina* (6); *The Mark Lane* (7); *The Rialto.* (8) As to payment for work done: *The Benlarig* (9); *The Kate B. Jones* (10); *The Edenmore* (11); Kennedy on the Law of Civil Salvage, pp. 204, 208, 209, 210.]

Cur. adv. vult.

May 1. BRUCE J. [After detailing the facts already set out, and making an award to the owners, master, and crew of the *Medoc* of 2000*l.*, the learned judge proceeded:—] The case of the *Hawkhurst* remains to be considered. The question is whether the agreement should be upheld. That involves the consideration of the rule which should guide the Court in

(1) 5 Asp. M. L. C. 214.
(2) 8 P. D. 115.
(3) 13 P. D. 31.
(4) L. R. 1 A. & E. 58.
(5) 1 P. D. 260.
(6) 2 P. D. 5.
(7) 15 P. D. 135.
(8) [1891] P. 175.
(9) 14 P. D. 3.
(10) [1892] P. 366.
(11) [1893] P. 79.

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upholding or setting aside an agreement of this character. I think I may take as my guide the observations of the present Master of the Rolls in the case of *Akerblom* v. *Price*. (1) "The fundamental rule of administration of maritime law in all Courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties . . . . If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances."

A number of cases have been cited during the argument; in some of them slightly different language has been used by the judges—sometimes the word *exorbitant* has been used—sometimes the word *inequitable*; but in substance all the cases are, I think, consistent with the rule laid down in *Akerblom* v. *Price* (1) as the fundamental rule. The question, therefore, to be determined is whether the agreement was manifestly unfair or unjust. At first sight a bargain to pay 500*l*. for a towage lasting only half-an-hour may seem to be manifestly unfair and unjust. But the circumstances of the particular case must be considered. The duration of salvage services in very many cases is not the true criterion of their value.

In the present case the master of the *Strathgarry*, relying upon the opinion of his engineer, was sanguine in the belief that the half-hour's towage would enable him to get his engines to work so as to bring his vessel into safety without further assistance. It is true that the expectations of the engineer of the

(1) 7 Q. B. D. 129, at pp. 132, 133.

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Strathgarry were not realised; but it has not been suggested that the engineer had not some reasonable grounds for his opinion. The engineer, a person competent to form a judgment, believed that he had got the engines into such a state that if he could have the *Strathgarry* towed for half-an-hour he would be able to get his engines to work with one cylinder, and so dispense with all further assistance. The master of the *Hawkhurst* offered to tow, or at least to attempt to tow, the *Strathgarry* to Rio; but the master of the *Strathgarry* did not then want to accept assistance of that character. He did not wish to incur the liability which an important service of that kind would involve. All he asked for was towage for half-an-hour. The master of the *Hawkhurst* was willing to tow him for half-an-hour for 750*l.*, or arbitration; but the master of the *Strathgarry*, according to the evidence of the master of the *Hawkhurst*, would not have either. Why would he not have arbitration? I think the reason is plain—because he expected the services would be successful, and he thought that if successful services were rendered to his ship, having regard to the value of his ship, freight, and cargo, which was more than 43,000*l.*, he might have to pay a sum of more than 500*l.*, and, in the circumstances, he preferred to make a bargain for 500*l.*, so that he might limit the extent of his liability. As the event proved, the services rendered by the *Hawkhurst* were not successful; but in forming an opinion of the fairness or unfairness of the agreement, I think the Court must regard the position of the parties at the time the agreement was entered into. The agreement cannot become fair or unfair by reason of circumstances which happened afterwards. Had the service been successful, I think that it would have been impossible to say that the sum of 500*l.* would have been an unfair or unjust sum for the *Strathgarry* to pay. But then it is said that the master of the *Strathgarry* undertook to pay 500*l.* for half-an-hour's towage, whether that service would be successful or not. That is true; but if he preferred that form of agreement and if it was his wish, as I think it was, to prevent the possibility of a larger claim being made upon him in the event of the towage leading to a successful result, I cannot say that it was manifestly unfair or unjust for him, in order to obtain a certain

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fixed limit to his liability, to agree to pay the specified sum on the sole condition that the specified service was rendered. Thus far I have tried to consider the fairness of the agreement as regards the *Strathgarry*.

Let me now consider the matter as regards the *Hawkhurst*. Was the sum of 500*l*. an excessive sum for her to receive for the specified service? The service lasted only a short time; but the Elder Brethren tell me that in services of this character a very considerable part of the danger and difficulty arises at the commencement of the service. Hawsers are not made fast between large vessels in the South Atlantic, even in fine weather, without risk, and the mere manœuvring of the *Hawkhurst*, and the commencing to get a strain upon the towing hawser, was a service certainly attended with some danger. The *Strathgarry* is a steamship of nearly 5000 tons gross, and the towage of such a vessel was a service necessarily involving risk. The master of the *Hawkhurst* in his evidence says that after he got the *Strathgarry* into position he towed with his engines at full speed. The object of the towage seems to have been to force the propeller to revolve, so as to help the engines to turn; and although it is not stated in the agreement that the *Hawkhurst* should tow at full speed, yet it seems to have been understood by the masters of both vessels that towage at full speed was essential. Such a service must, the Elder Brethren think, have put a considerable strain upon the engines of the *Hawkhurst*, especially having regard to the violent sheering of the *Strathgarry*. At the end of the half-hour the steel hawser broke, and the recoil of the spring killed the chief officer of the *Hawkhurst*, injured two other men on board, and caused damage to the ship, estimated at 100*l*. In considering the fairness or unfairness of the agreement, I cannot, I think, as regards the *Hawkhurst*, any more than as regards the *Strathgarry*, take into consideration the events that happened after the agreement was made. But the events that actually did happen are only illustrations of the risks incidental to such services as the *Hawkhurst* rendered. Can I say that it was manifestly unfair or unjust on the part of the master of the *Hawkhurst*, before entering upon a service that involved, or that might involve, such risk, to bargain that he

should be paid 500*l.*? The value of the *Hawkhurst*, her cargo and freight, was 52,000*l.*; and it seems to me not unreasonable that a master having such an amount of property entrusted to his care should not undertake to render a service, certainly involving some risk to his ship, cargo, freight, and crew, without securing some substantial advantage to his owners.

It must be remembered that the 500*l.* was only to be paid on condition of the stipulated service being rendered. The towing hawser parted just after the expiration of the stipulated half-hour's towage. If it had parted during the half-hour, and the towage had then been discontinued, the 500*l.* would not have been due. In the result, having given the whole case full consideration, I have come to the conclusion that I cannot say that the agreement was manifestly unfair or unjust. I must, therefore, uphold it, and award to the *Hawkhurst* the stipulated sum of 500*l.*

Award to Medoc 2000*l.*
Agreement to pay the Hawkhurst 500*l. upheld.*

Solicitors for plaintiffs, the owners, master, and crew of the *Medoc*: *Gellatly & Warton.*

Solicitors for plaintiffs, the owners, master, and crew of the *Hawkhurst*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Strathgarry*, her cargo and freight: *Botterell & Roche.*

T. L. M.

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May 28, 29.

L. otherwise B. *v.* B.

Nullity of Marriage—Wife's Petition—Impotence—Delay—Sincerity.

A wife, seven years after her marriage, took proceedings for nullity on the ground that (as the fact was) the marriage had not been consummated owing to the impotence of her husband. It appeared that the impossibility of sexual intercourse had caused unhappy relations between the petitioner and the respondent, in consequence of which they had separated, but that since the filing of the petition she had offered to return to him:—

Held, that the conduct of the petitioner had not been such as to constitute an estoppel within the meaning of the dictum of Lord Selborne in *G.* v. *M.* (10 App. Cas. 171, at p. 186) as to want of sincerity, and that she was entitled to a decree of nullity.

Petition of a wife for a declaration of nullity on the ground that the marriage had not been consummated owing to the impotence of her husband. This was proved. It appeared that the marriage took place in April, 1887, and that the petition was filed in April, 1894. The petitioner and the respondent had lived together up to March, 1894, though they had had frequent quarrels. The petitioner admitted in cross-examination that she discovered that the respondent was impotent shortly after the marriage, and knew then that she could have obtained a decree of nullity, and that since the petition was filed she had written him several letters in which she offered to return to him.

R. H. Pritchard, for the respondent, submitted that the conduct of the petitioner shewed want of sincerity. [He referred to *H. falsely called C.* v. *C.* (1), *M. falsely called B.* v. *B.* (2), *W. falsely called R.* v. *R.* (3), *Cuno* v. *Cuno* (4); and *M. otherwise D.* v. *D.* (5)]

Bargrave Deane, for the petitioner, referred to *G.* v. *M.* (6)

Sir F. Jeune, President. The effect of the decisions as to what constitutes want of sincerity in a petitioner for a decree of nullity of marriage was considered in the House of Lords in the case of *G.* v. *M.* (6) In his judgment in that case Lord Selborne

(1) 1 Sw. & Tr. 605.
(2) 3 Sw. & Tr. 550.
(3) 1 P. D. 405.
(4) L. R. 2 H. L., Sc. 300.
(5) 10 P. D. 75.
(6) 10 App. Cas. 171.

says: "The real basis of reasoning that underlies that phraseology is this and nothing more than this, that there may be conduct of the person seeking this remedy which ought to estop that person from having it." (1) This is, no doubt, the true principle.

The present seems to me a very simple case. If the petitioner could have gone back to the respondent with any hope of their living happily together, notwithstanding the impossibility of sexual intercourse, I think that she would have done so. Her letters seem to me to shew this. I have no doubt, however, that the impossibility of sexual intercourse was the real cause of the unhappiness of her relations with him. This has been the root of all the trouble and bitterness, which has ended in complete separation; and it is because she has found her married life intolerable for this reason, that the petitioner has taken these proceedings. Does her conduct shew insincerity? I think not. She applies for a decree of nullity, not from any ulterior motive, but because this remedy alone can put an end to her unhappiness; and she is not, as it seems to me, less entitled to relief, because her motive is not so much desire for sexual intercourse, as the wish to escape from a state of things which the impossibility of sexual intercourse has rendered intolerable. I grant a decree nisi with costs.

Solicitors for petitioner: *Wood & Wootton.*

Solicitors for respondent: *Rooke & Sons, for Brain & Brain, Reading.*

(1) At p. 186.

H. D. W.

1895

May 7; *June* 24.

RICHARDSON *v.* RICHARDSON AND PLOWMAN.

Divorce — Practice — Costs — Pauper — Solicitor — Husband suing in Formâ Pauperis for Dissolution of Marriage—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.

Subject to the discretion of the Court under s. 51 of the Divorce Act, 1857, it is the practice in the Probate Division to allow a husband suing in formâ pauperis for dissolution of marriage only his or his solicitor's costs out of pocket, including those of the certificate, and in the latter case a reasonable sum for office expenses, against the co-respondent.

Carson v. *Pickersgill & Sons* (14 Q. B. D. 859) followed.

Semble, per Sir F. Jeune, President, that a barrister or a solicitor may receive fees from such pauper petitioner, and that a solicitor not assigned by the Court, but employed by such pauper petitioner, can sue his client on a retainer: also that the respondent and co-respondent may, if successful, obtain an order for full costs against such pauper petitioner: also that there is no clear rule of practice as to whether the respondent should obtain an order for security for costs against such pauper petitioner, but each case must be dealt with on its own merits.

APPLICATION by a petitioner in formâ pauperis for an order requiring the taxation of his costs to be reviewed.

The action had not been defended, and the petitioner had obtained a verdict for 30*l.* damages, and a decree nisi with costs against the co-respondent. The registrar had disallowed all items except those for expenses out of pocket and a sum of 6*l.* 6*s.* for office expenses, stating that such had been the practice in the Division since the decision of the Court of Appeal in *Carson* v. *Pickersgill & Sons*. (1)

Tebbutt, in support of the application. It is submitted that full costs should be allowed. The Court has absolute discretion under s. 51 of the Divorce Act, 1857. The text-books on Ecclesiastical Law draw no distinction between "pauper" and "dives" costs: see Burn's Ecclesiastical Law, ed. 1842, vol. iii., p. 185; Rogers' Ecclesiastical Law, ed. 1840, p. 268; Conset, Ecclesiastical Practice, p. 56. It appears to have been the practice of the Court of Chancery to allow a suitor in formâ pauperis, if successful, "dives" costs: *Rubery* v. *Morris*. (2)

Cur. adv. vult.

(1) 14 Q. B. D. 859. (2) 1 Mac. & G. 413.

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SIR F. JEUNE, PRESIDENT. The question in this case is whether a pauper petitioner, who has succeeded in a suit for dissolution of marriage, should be allowed to recover his full costs against the co-respondent.

The practice in this Division as to pauper's costs in Divorce cases has never found its way into the reports, and it is, I think, desirable, so far as is necessary in the present instance, to state what, on the best inquiries I can make, I believe it to be. The questions which arise are, of course, not so much as to the right to orders for costs, as of taxation on such orders.

A person who is permitted to sue in the Divorce Court in formâ pauperis is exempted from the payment of Court fees. I have no doubt that in former times counsel and solicitor were assigned to him, just as they are in the Courts of Common Law, and that such counsel and solicitor had no right to look to their pauper client for payment, at any rate, for immediate payment. It is sufficient for me to refer to the passages in Oughton on this point. In tit. 8 (1), "De Admissione in Formâ Pauperis," he indicates the procedure by which a petitioner was admitted to sue as a pauper, stating, amongst other things, that if the opponent of the pauper so desire, the pauper must make oath that he will pay the expenses "cum ad uberiores Fortunas pervenerit." In tit. 49 (2), among the various cases, certainly more numerous than at present, in which advocates and proctors would be assigned by the Court, occurs that of such assignment to a pauper. According to a statute of Archbishop Winchelsey of 1295, it was laid down with regard to advocates and proctors so assigned, "Gratis, ac sine ullâ spe receptionis Feodorum, Consilium dabunt." It was no doubt in reference to this practice that, in *Lovekin & Others* v. *Edwards & Others* (3), Sir John Nicholl said: "To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself."

Of late years the practice of assigning counsel and solicitors

(1) Ordo Judiciorum, vol. i. pp. 23, 24.

(2) Ordo Judiciorum, vol. i. p. 82.

(3) 1 Phillim. 179, at p. 183.

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to paupers has not been followed in matrimonial causes, though the power to do so remains. Part of the reason for this probably was that, as poverty in the husband is generally poverty in the wife, there must, in defended cases, be a double assignment. Perhaps, too, it was thought, as indeed is generally the case, that pauper petitioners can themselves manage to present their cases to the Court, with, at any rate, such aid as counsel are often willing to give. Whatever the reason, the present practice undoubtedly is as I have stated.

It follows, I think, that there is nothing to prevent counsel or a solicitor being retained by a pauper and receiving from him such fees as he, perhaps by the aid of friends, may be able to pay, and this is the effect of the opinion given by the Attorney-General (Sir Richard Webster) in 1890. (1) Whether a solicitor not assigned by the Court, but employed by the pauper, could. if he thought it worth while, sue his client on a retainer, it is not necessary to decide ; but my present opinion is that he could.

But it does not, I think, follow, nor has it been the practice, that a successful pauper can recover full costs against a co-respondent. It would be very undesirable that he should do so, partly because bargains between solicitors and clients for payment out of costs recovered against the co-respondent, which is the real nature of the inevitable bargain in such cases, are not to be encouraged, but more because a respondent wife can make no such bargain, and would so be placed at a disadvantage. It would be impossible to allow her to arrange with her solicitor that he should be paid by the co-respondent, through the husband, only in the case of her and the co-respondent failing successfully to defend themselves. I have been informed that in one case at least, some years ago, a successful pauper was allowed to recover full costs against the co-respondent on the terms of paying the court fees. But since the case of *Carson* v. *Pickersgill & Sons* (2), not, I believe, because Sir James Hannen considered that case as more than an authority by analogy, the practice that a pauper should recover against the co-respondent only his actual and necessary costs has been invariable.

I am asked to depart from this practice on the grounds that I

(1) See the *Law Times*, vol. 90, p. 79. (2) 14 Q. B. D. 859.

have full discretion over costs by virtue of the 51st section of the Act of 1857, and that the Chancery practice before the Judicature Act, rather than the Common Law practice, ought to be followed.

What these two practices respectively were appears clearly from the case of *Carson* v. *Pickersgill & Sons* (1) in the Court of Appeal. No doubt they differed. At Common Law, by the effect of statute (2), a solicitor could not recover costs from a pauper client. It was, therefore, eventually held by the Courts of Common Law that it would be unjust to allow a pauper to recover against an opponent costs for which he was not himself legally liable, and it would appear from the judgment of the Master of the Rolls that he could recover only the actual expenses of the solicitor, including an allowance for the services of his clerks. The Court of Chancery, on the other hand, emphasizing the punitive effect of costs, took the view that an unsuccessful defendant ought not to escape paying costs because his opponent was a pauper, a view which the Master of the Rolls considered ethically unsound. (3) It would seem that the practice of the House of Lords is the same as that of the Common Law Courts, the fees to counsel being disallowed, but the solicitor obtaining "his costs out of pocket with a reasonable allowance to cover office expenses, including clerks, &c.": see *Johnson* v. *Lindsay & Co.* (4)

I desire to follow what, I think, was the view of Sir James Hannen, that for the Divorce Court in this matter the Common Law practice affords the best analogy. So long as counsel and proctors were assigned the analogy was perfect. They could not recover from a pauper for their services in this Court any more than could attorneys in the Courts of Common Law. No doubt the cessation of the practice of assigning legal advisers makes the position different from that in the Common Law Courts; and it must, I think, be admitted that the rule of refusing a successful pauper his full costs in the Common Law Courts was based in great part on the law which prevented a solicitor from being retained by, or recovering costs against, a pauper client.

(1) 14 Q. B. D. 859.
(2) 11 Hen. 7, c. 12.
(3) 14 Q. B. D. 866, 867.
(4) [1892] A. C. 110.

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But there remain the considerations to which I have referred above, the strong objection to bargains for payment at the co-respondent's expense, and the still stronger objection, peculiar to the Divorce Court, of the inevitable disadvantage to the wife.

I think, therefore, that the practice—it must be remembered only the practice, because the statutory power of the Court remains unfettered—should be adhered to of allowing a pauper only his or his solicitor's costs out of pocket, understanding the term as defined by the Master of the Rolls in *Carson* v. *Pickersgill & Sons* (1) with regard to Common Law costs, or in the case I have referred to with regard to the practice in the House of Lords. I think that the costs due to counsel and solicitors for obtaining the necessary certificate should be included.

It is not necessary for the purpose of disposing of this case to decide what practice should be followed when a wife or a co-respondent succeeds against a pauper petitioner, nor is it probably a matter of much practical importance. But it may be useful for me to say that I understand the practice hitherto followed has not excluded successful respondents and co-respondents from obtaining an order for their full costs, for what it is worth. At first sight this seems to place the pauper on an inequality with his opponents, because they obtain an order for their full costs, which he does not; but, on the other hand, to give them no order at all for costs would place them in a less favourable position than the pauper, as he can at least recover costs out of pocket, and the advantage which the pauper obtains over other litigants in escaping the payment of Court fees may be considered, to some extent, to counterbalance the difference between the amount of costs he is able to recover and possibly liable to pay. I think, therefore, that there should be no hard-and-fast rule of practice absolving a pauper who fails from liability to an order for costs against him.

Whether a wife should obtain an order against a pauper husband for security, with a stay on failure to provide such security, is a matter as to which, I understand, no clear rule of practice exists, nor, in my opinion, should be laid down. Such cases must be rare, and each should, I think, be dealt with on

(1) 14 Q. B. D. 859, 869.

its own merits, especial regard being had to the nature of the defence relied on by the wife. 1895

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Solicitors: *Bramall, White, & Sanders.*

H. D. W.

THE JACOB CHRISTENSEN. 1895 May 15.

Admiralty—Collision—Practice—Third Party—Indemnity—Rules of the Supreme Court, 1883, *Order* XVI., *r.* 48.

The plaintiffs commenced an action in rem for damages sustained by their steamer by collision with the defendants' steamer. The defendants served a third party notice on the ship repairers under whose control, it was alleged, the defendants' steamer was at the time, and claimed to be indemnified by them against liability. The third parties appeared under protest; and the defendants applied for directions as to the mode of procedure:—

Held, by Bruce J., that the application must be refused, and the third party notice set aside, as (without deciding whether the defendants would have a right of action against the third parties in the event of the defendants' vessel being found to blame) there was no contract express or implied with the third parties involving an indemnity within the meaning of the Rules of the Supreme Court, 1883, Order XVI., r. 48.

APPEAL to the judge in chambers (adjourned into court) by defendants in an action in rem for damage by collision, against the refusal of the registrar to give directions as to the mode of procedure on a third party notice previously issued.

On January 17, 1895, a collision occurred in the Tyne between the plaintiffs' steamship *Mid-Surrey* and the Norwegian steamship *Jacob Christensen*, owned by the defendants, but at the time in the hands of H. S. Edwards & Sons of North Shields, ship repairers, who appeared under protest, and were the third parties upon whom the defendants, under Order XVI., r. 48, of the Rules of the Supreme Court, 1883, had served the notice claiming to be indemnified against liability in the action brought by the plaintiffs against the defendants.

H. S. Edwards & Sons were employed by the defendants to supply and fit a donkey-engine and execute certain repairs to their vessel. For that purpose she was moored alongside Messrs. Edwards' quay on the north side of the River Tyne; but in consequence of very heavy weather coming on causing the vessel to

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bump against the quay, with consequent risk of damage to her plates, it was not considered safe for her to remain there longer, and Messrs. Edwards (it was alleged after consultation with the master, and in the interest of the owners) engaged two tugs, a pilot, and nine men, in order to remove her from the quay and moor her to the Stanhope buoys on the south side of the river. Whilst being taken across the Tyne the collision with the plaintiffs' steamship occurred.

D. Stephens, for the defendants, in support of the appeal.
J. A. Hamilton, for the third parties.

The plaintiffs took no part in the appeal.

[In addition to the cases cited in the judgment, the following were referred to: *Speller* v. *Bristol Steam Navigation Co.* (1); *The Cartsburn* (2); *The Bianca.* (3)]

BRUCE J. (after referring to the facts already set out, continued). I have arrived at the conclusion that I ought to affirm the decision of the registrar.

The defendants, the owners of the *Jacob Christensen*, have contended before me that the ship was not under the control of persons for whom they were responsible, but, on the authority of *The Ruby Queen* (4), *The Lemington* (5), *The Ticonderoga* (6), and some other cases which were cited, it was alleged, that, as a maritime lien attached to the ship, and the proceedings were in rem, they would have no defence to the action. It was said that it was unreasonable that the defendants should be compelled to pay damages occasioned by persons for whom they were not legally responsible without a remedy over.

It is not necessary for me to decide now whether a maritime lien attaches under the circumstances which have been suggested; it is enough for me to say that for the purpose of this summons I assume that the contention of the owners of the *Jacob Christensen* is right upon that point. They say that "if we are obliged to pay damages to the *Mid-Surrey* for the negligence of

(1) 13 Q. B. D. 96.
(2) 5 P. D. 35.
(3) 8 P. D. 91.
(4) Lush. 266.
(5) 2 Asp. M. L. C. 475.
(6) Sw. 215.

persons employed by Messrs. Edwards, we ought to have a right against Messrs. Edwards, so that we may recover from them those damages." With reference to that, the matter I have to consider is not whether there may, or may not, be a right of action on the part of the owners of the *Jacob Christensen* against Messrs. Edwards, but whether they are entitled to contribution or indemnity over against Messrs. Edwards within the meaning of Order XVI., r. 48. I have come to the conclusion that they are not. My decision is based upon the meaning of the word "indemnity" as used in the order in question; it has been held to mean indemnity arising out of a contract express or implied, and, without saying whether in the case supposed the owners of the *Jacob Christensen* would or would not have a right to sue Messrs. Edwards, there is nothing to create a right to an "indemnity" within the meaning of the word as used in the rule I have referred to.

I think that rule means that the indemnity relied upon must arise out of some contract express or implied, and it is clear that the contract with Messrs. Edwards was not a contract which involved an indemnity.

For the convenience of the parties it was agreed that, if I arrived at that conclusion, I should set aside the order made to bring in Messrs. Edwards as third parties, because it is useless to continue them as third parties unless some direction is given to determine the mode of proceeding.

In the result, therefore, I affirm the registrar's refusal to give directions, and set aside the order making Messrs. Edwards third parties.

Solicitors for plaintiffs, the owners of the *Mid-Surrey*: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants, the owners of the *Jacob Christensen*: *Thomas Cooper & Co.*

Solicitors for third parties, H. S. Edwards & Sons: *Hollams, Sons, Coward & Hawksley.*

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May 27, 28.

THE HEREWARD.

Admiralty—Co-ownership—Sale of Ship against will of Majority—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 8.

The majority of the co-owners of a ship formed a limited company to which they transferred their shares. The minority of the co-owners moved, in an action of restraint, for the sale of the ship:—

Held, by Bruce J., that the majority of the co-owners had no right to change the character of the ownership without the consent of all parties, and therefore, in the exercise of the discretion of the Court under s. 8 of the Admiralty Court Act, 1861, and in the interests of all concerned, the sale of the whole ship would be decreed.

MOTION under s. 8 of the Admiralty Court Act, 1861 (1), by William Inglis and others, minority owners and plaintiffs in an action of restraint against the defendants, the owners, other than the plaintiffs, of the *Hereward*, for an order for the appraisement and sale of the ship.

John Potter, a shipbroker, who died August 13, 1894, held thirty-eight sixty-fourth shares in the ship, and acted as managing owner. His executors, acting on behalf of the beneficiaries under his will, in February, 1895, formed the *Hereward* Sailing Ship Company, Limited, and transferred these shares to the company. The plaintiffs, the owners of twenty-four sixty-fourth shares alleged that thereby their liability had been increased, their shares rendered unsaleable, and the profitable working of the ship in the interests of all concerned prevented.

Aspinall, Q.C., and *F. Laing*, in support of the motion on behalf of the minority owners. (2)

Sir Walter Phillimore, and *Stokes*, for the majority owners, the limited liability company. (3)

(1) 24 Vict. c. 10, s. 8: "The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership . . . of any ship registered at any port in England or Wales, or any share thereof and . . . may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit."

(2) The owner of the remaining two sixty-fourth shares was not represented, but it was alleged was willing to join the company.

(3) An application, under a cross-

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The arguments of counsel fully appear from the judgment.

[In addition to the cases there mentioned, the following was referred to: *The Marion.* (1)]

Cur. adv. vult.

May 28. BRUCE J. In this case I have come to the conclusion that I should decree the sale of the ship. I do so upon the ground that it seems to me to be beneficial to the interests of the parties generally that the ship should be sold. The majority of the owners have, by constituting themselves a limited liability company, made it impossible that the ship can be profitably employed in the general interests of the owners, unless the dissenting owners, the minority of the owners, agree to come into the company. In my opinion, the managing owners of the ship, the majority of the owners of the ship, have no right thus to change the character of the ownership except with the consent of all persons concerned.

I am satisfied that the course taken by the majority must be ruinous to the interests of the holders of the twenty-four sixty-fourths, unless they consent to come into the company. That the Court possesses power to direct the sale is beyond question. It is true it has been given by a recent Act; but the reason why the power was given was because it was found that without that power the Court was often unable to adjust disputes between parties. No rules are given in the statute as to how this power is to be exercised. It is left entirely to the discretion of the Court; but it is clear from the decision of Sir Robert Phillimore in *The Nelly Schneider* (2) that that power may be exercised on the application of a minority of part-owners; and it seems to me that, when part-owners of the ship are unable to agree as to what is to be done with their common property, and there appears to be no way of preventing the sacrifice of the property except by a sale, the Court ought to direct a sale.

I was impressed by what counsel for the majority owners said

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summons, in the action of restraint, with reference to the amount of the security to be given to the minority before the ship could be taken out of the jurisdiction by the majority, does not call for report.

(1) 10 P. D. 4.

(2) 3 P. D. 152.

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as to the reluctance the Court must always have in directing the sale of a man's property against his consent, and I agree that the Court ought to be very cautious in directing a sale against the majority of the owners; nor should it do so unless it is well satisfied that it is to the interest of all concerned.

In order to guide me in the exercise of my discretion, I have tried to find some analogy in other branches of the law. I do not mean to say that the case of the sale of real property is in all respects similar to the case of the sale of ships; but there is some analogy. In the case of *Pitt* v. *Jones* (1) a sale of real property was directed by the Court of Appeal and sanctioned by the House of Lords, on the ground that it was for the general interest, on the application of only three-sixteenths of the owners. One of the matters which guides the discretion of the Court in acting under its statutory powers is that the majority of the owners are, as in this case, unwilling to purchase the interests of the minority; and where I find that the statute has given general power, I do not think I can be wrong in saying that the Court may at least exercise that discretion where it is satisfied that it is to the general interest of all persons concerned that the property should be sold. At the same time, while I make such a decree, I think it is right to give time to see if the parties cannot come to terms. It may be that the majority of the owners will be willing to purchase the interests of the minority; and therefore I shall direct that the order lie in the registry for four days.

Decree for sale of whole ship. (2)

Solicitor for plaintiffs, the minority owners: *Charles E. Harvey.*

Solicitors for defendants, the majority owners: *Downing, Holman & Co.*

(1) 5 App. Cas. 651.

(2) Leave was given to appeal, but the matter was ultimately settled and the appeal abandoned.

T. L. M.

IN THE GOODS OF PONSONBY. 1895 July 8.

Probate—Administration with the Will annexed—Bodily Incapacity of Executor.

Where an executor was incapacitated through illness, the Court made a grant of administration with the will annexed to a residuary legatee for life for the use and benefit of the executor till his recovery.

BY her will and a codicil thereto Miss Georgina Melita Maria Ponsonby appointed her brothers, the Rev. Frederick John Ponsonby and Sir Henry Frederick Ponsonby, trustees and executors. Under the will and codicil Miss Harriet Julia Frances Ponsonby and Mrs. Selina Barbara Baring, sisters of the testatrix, were legatees for life of two-thirds and one-third respectively of the residuary estate. One of the executors, the Rev. Frederick John Ponsonby, was dead; the other executor, Sir Henry Frederick Ponsonby, was seriously ill, and it had been found impossible to serve him with a citation to accept or refuse probate.

Priestley applied on behalf of Miss Harriet Ponsonby, with the consent of Mrs. Baring, for a temporary grant of administration with the will annexed.

SIR F. JEUNE, PRESIDENT. According to Oughton (1), such a grant may be made "durante corporis aut animi vitio." A grant may be taken of administration with the will annexed for the use and benefit of the executor till his recovery.

Solicitors: *Leman, Groves & Leman.*

(1) Ordo Judiciorum, tit. 219, s. 1, n. (*a*).

H. D. W.

1895
June 18, 19, 20, 21.

BROUGHAM *v.* BROUGHAM (THE QUEEN'S PROCTOR INTERVENING).

Divorce—Dissolution of Marriage—Husband's Petition—Unreasonable Delay in presenting Petition—Questions for the Jury—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

In a case in which the Queen's Proctor intervened to prevent a decree nisi obtained by a husband for the dissolution of his marriage being made absolute on the ground of unreasonable delay in presenting the petition, the proper questions for the jury were held to be, When did the petitioner first know or have reason to believe that the respondent had committed adultery? and when did the petitioner first take action in order to obtain a divorce?

INTERVENTION of the Queen's Proctor to prevent the decree nisi obtained by the petitioner, the Hon. Wilfrid Brougham, for the dissolution of his marriage with the respondent, the Hon. Frances Isabella Brougham, by reason of her adultery, being made absolute, on the grounds "that the decree had been obtained contrary to the justice of the case by withholding from the knowledge of the Court material facts, and that the petitioner had been guilty of unreasonable delay in presenting the petition."

The case was tried before the President and a special jury.

The petition had been heard by Gorell Barnes J. on August 3, 1893. There was no defence. It appeared that the marriage had taken place in 1863, and that there were three children of it, all of whom were of age. The petitioner gave evidence that he had separated from his wife in 1871 in consequence of a quarrel, and that they had not since cohabited. The birth of an illegitimate child was proved. The decree nisi had been obtained on this evidence alone.

For the Queen's Proctor it was proved that between the separation in 1871 and 1879 the respondent had given birth to three illegitimate children; that in 1877 the petitioner had obtained a decree for restitution of conjugal rights, the respondent, who did not defend the suit, being present at the hearing; that the respondent had disobeyed the decree, and a writ of sequestration had issued against her separate estate; and that in 1880 she had agreed with the petitioner to allow him 600*l.* a

year on condition that he did not enforce the decree. A son of the petitioner deposed that in 1880 he told the petitioner that he had heard that the respondent had had a child.

Sir F. Lockwood, Q.C., S.-G., Inderwick, Q.C., and *Guy Stephenson,* for the Queen's Proctor.

Lawson Walton, Q.C., and *Bargrave Deane,* for the petitioner.

SIR F. JEUNE, PRESIDENT. Where there is an issue as to unreasonable delay, I think that there are two questions for the jury, namely, When did the petitioner first know or have reason to believe that the respondent had committed adultery? and, When did the petitioner first take action in order to obtain a divorce? These facts having been found, it is for the Court to exercise its discretion. The case of *Nicholson* v. *Nicholson* (1) is an authority for holding that a delay of two years is unreasonable, and, if unexplained, disentitles a petitioner to a divorce. There is no magic in the period of two years; but, having regard to the dates in this case, I think that the two questions may, for simplicity's sake, in the present instance, be combined, and I propose to put this question to the jury: Did the petitioner know or have reason to believe that the respondent had committed adultery two years before he took action to obtain a divorce?

Lawson Walton, Q.C. I do not suggest any other question.

Sir F. Lockwood, Q.C., S.-G. Ought not the jury to be asked a question as to the withholding of material facts?

THE PRESIDENT. Should the jury answer the question which I suggest in the affirmative, their answer will amount to a finding that material facts have been withheld. Should they answer it in the negative, their answer will be, in effect, a finding that material facts have not been withheld. But I will put a formal question as to the withholding of material facts.

THE PRESIDENT put two questions to the jury: Did the petitioner know or have reason to believe that his wife had been

(1) L. R. 3 P. & D. 53.

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BROUGHAM v. BROUGHAM.

guilty of adultery two years before he took action to obtain a divorce? and, Were material facts withheld at the trial of the suit for dissolution?

The jury answered both questions in the affirmative.

THE PRESIDENT held that the petitioner had been guilty of unreasonable delay in presenting the petition, and rescinded the decree nisi and dismissed the petition, with costs to the Queen's Proctor.

Solicitors: *The Queen's Proctor; Lewis & Lewis.*

H. D. W.

1895

June 17; *July* 1, 17.

IN THE GOODS OF M'AULIFFE.

Probate—Administration with the Will annexed—Legacy to a Roman Catholic Convent.

A testatrix bequeathed the residue of her property to A. B. "to be disposed of as she shall think fit at her discretion for the benefit of" a Roman Catholic convent. The executor of the will and A. B. having died during the lifetime of the testatrix, the Court made a grant of administration with the will annexed to the Reverend Mother of the convent as residuary legatee, on proof of the permanence of the institution, and of the fitness of the Reverend Mother, having regard to her powers, to receive and apply the legacy.

Walsh v. *Gladstone* (1 Ph. 290) followed.

APPLICATION by the Reverend Mother of the Roman Catholic Convent of St. Edward, Blandford Square, London, for a grant of administration with the will annexed of the personal estate of Hannah M'Auliffe. The material provisions of the will are stated in the judgment. The value of the estate was about 456*l*.

Younger, for the applicant, submitted that the grant should be made to her as residuary legatee, the legacy being small, and there being no necessity for an application to the Chancery Division for a scheme. [He cited *Cole* v. *Wade* (1), *Burrough* v. *Philcox*, *Lacey* v. *Philcox* (2), and *Presant* v. *Presant and Goodwin.* (3)]

Cur. adv. vult.

(1) 16 Ves. 27. (2) 5 Myl. & Cr. 73.

(3) 1 Sw. & Tr. 544.

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IN THE GOODS OF M'AULIFFE.

SIR F. JEUNE, PRESIDENT. The question in this case relates to the form of the grant of administration which it is proper to make.

By her will dated December 17, 1885, the deceased, Hannah M'Auliffe, appointed the Rev. Philip Cavanagh executor, and, after giving a legacy of 11*l.* 5*s.* to Catharine Headon, bequeathed the residue of her property "to the said Catharine Headon, to be disposed of as she shall think fit at her discretion for the benefit of the convent of St. Edward, Blandford Square." The Rev. Philip Cavanagh and Catharine Headon died in the lifetime of the testatrix.

A grant of administration is asked for in favour of Maria Blount, who holds the office of Reverend Mother of the convent of St. Edward.

The convent in question is a community of Roman Catholic sisters. There is no instrument prescribing the objects of the society, and no formal allocation of funds to specific purposes. But, in fact, the society devotes itself to four charitable works, the teaching of the children of the poor, the visiting of the poor in their homes, the visiting of the sick and infirm at hospitals and workhouses, and the sheltering and training of young women for domestic service. The property of the community is vested in a Council consisting of the Reverend Mother and three sisters, and is subject to their absolute discretion in the disposal thereof for the purposes of the community. The bank account stands in the name of the Reverend Mother and two of the said sisters. The other members of the Council concur in the application for a grant of administration to Maria Blount.

There can, I think, be no doubt that this would be a proper case for a grant under s. 73 of the Act of 1857. But what is asked is a grant to Maria Blount as residuary legatee, the object being that she shall not take the grant in a capacity which would imply the necessity of an application to the Chancery Division. I had considerable doubt whether this could be done. As confidence was obviously placed by the testatrix in the personal discretion of Catharine Headon, no doubt a trustee cannot be appointed in her place, and, as the several objects of the convent are not so well defined as to admit equal distribution

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IN THE GOODS OF M'AULIFFE.

The President.

amongst them, it would seem to be doubtful whether a scheme is not necessary. But I have been referred to a case of *Walsh* v. *Gladstone* (1), where the circumstances closely resemble those in the present instance, which appears to me to shew that no scheme is required. There, a legacy was given to a certain person to be applied to the use of a Roman Catholic college, and, the legatee having died in the lifetime of the testator, it was urged on behalf of the Attorney-General that a scheme was necessary. But the Lord Chancellor, affirming the decision of the Vice-Chancellor, held that, though the legatee might have had a discretion, if he had been living, as to the application of the fund, yet it would have been a fair exercise of that discretion to have paid it over to the president of the college, and that, if the Court was of opinion that the funds would be safe in his hands, it would be justified in doing the same. I am satisfied in this case as to the permanence of the institution, and the fitness of the Reverend Mother, having regard to her powers (2), to receive and apply the legacy in question. I think, therefore, that a grant may be made to her as residuary legatee.

Solicitor: *Thornton.*

(1) 1 Ph. 290.

(2) It appeared by the applicant's affidavit that in her capacity of Reverend Mother she was one of four persons who had absolute discretion in the management and disposal of the common fund into which all moneys received by the institution were paid, and which was used for the maintenance of the convent generally and the assistance of the poor.

H. D. W.

THE RED SEA.

1895
June 26;
July 5.

Admiralty—Insurance, Marine—Abandonment—Cash Advances for Ship's Disbursements—Prepaid Freight—Rights of Underwriters on Ship.

The plaintiffs were insurers of the hull and machinery of the defendants' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, and was abandoned by the defendants to the plaintiffs as a constructive total loss, but the cargo of timber was subsequently duly delivered.

The plaintiffs claimed the gross freight as a benefit incident to the ship; but the defendants contended that they were entitled to deduct two sums—namely, 1677*l.* 19*s.* 10*d.* cash advanced to the master by the charterers for ship's ordinary disbursements at the port of loading under a clause in the charter-party, by which the ship was to pay "2½ per cent. commission including insurance," and a sum of 339*l.* 4*s.* 9*d.* for coals and other expenses necessarily incurred at Norfolk, Virginia, by the master to enable the ship to proceed on her voyage:—

Held, by Bruce, J., that the defendants were entitled to deduct the sum of 1677*l.* 19*s.* 10*d.*, advanced by the charterers at the port of loading as being subject to sea risk, capable of insurance, and equivalent to a prepayment of freight; but the sum of 339*l.* 4*s.* 9*d.* could not be deducted, this disbursement not having been incurred for freight alone.

HEARING, upon point of law, in an action upon a time policy of marine insurance to recover a balance of freight.

The plaintiffs were the underwriters on the hull and machinery of the steamship *Red Sea*. The defendants were the Sea Steamship Company, Limited, the owners of the steamship.

The facts (which were not in dispute) were shortly that:—

On April 17, 1894, the *Red Sea* was chartered by the managing owners of the vessel to carry a cargo of timber from Pensacola to a port in the United Kingdom as ordered on signing bills of lading, for a freight of 5*l.* 2*s.* 6*d.* per St. Petersburg standard of 165 cubic feet.

The cargo was shipped by the charterers at Pensacola, and by the charterparty it was provided that: (clause 13) "Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by charterers or their agents at the exchange of $4.75, ship paying 2½ per cent. commission" (words "and cost of" struck out and word "including" substituted in writing)

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"insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which (together with draft for difference in freight, if any (1)) shall be paid out of the first freight collected. In the absence of fraud, of clerical or obvious errors, the signing by the master of any such draft shall be conclusive evidence of and authority for the advance of such cash for disbursements, charges and freight differences." (Clause 19) "Freight to be paid as follows: one-third in cash on arrival, and the remainder on right delivery of cargo by good and approved bank bills payable in London at four months' date following, or in cash less 2 per cent. at owners' option."

By bill of lading, dated May 19, 1894, and indorsed to R. Wade, Sons & Co., to whom the property in the cargo passed, the cargo was required to be delivered at West Hartlepool "unto order of shippers or to their assigns, he or they paying freight for the said timber and deals, and all other conditions as per charterparty."

The charterers made disbursements for the ship at Pensacola amounting to 1677*l.* 19*s.* 10*d.*, which sum included $199.26 for "commission for advancing and disbursing @ 2½ % incl. ins." In respect of these disbursements the master signed and gave to the charterers a note dated May 19, 1894, in the following terms: "Five days after arrival at port of destination of the Brit. steamship called *Red Sea* of which I am the master, now lying at Pensacola loaded with pitch pine and ready to sail for West Hartlepool I promise to pay to the order of myself sixteen hundred and seventy seven pounds 19/10*d.* sterling in approved Banker's demand bills on London, value received, for necessary disbursements of my vessel at this port for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received, for account of my said vessel. Any other draft or obligation by me drawn at this port on said freight to be secondary to this." This note was indorsed by the master to the order of Price & Pierce of London, by whom it was indorsed for value to

(1) There was no difference between the chartered rate of freight and that of the bill of lading.

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R. Wade, Sons & Co., who held the same for value when the cargo arrived at West Hartlepool.

On May 20 the vessel sailed, and necessarily put into Norfolk, Virginia, for coals. In respect of the disbursements so incurred, amounting to 339*l.* 4*s.* 9*d.*, the master on May 26 gave his draft at thirty days' date upon the managing owners of the ship, by whom, on June 28, it was paid.

On June 16, in endeavouring to cross the bar at the entrance to the port of West Hartlepool, the vessel took the ground, and remained stranded; but on June 20, after a portion of the cargo had been put overboard to lighten her, she was towed off, and taken into the harbour, where her cargo was discharged, the timber put overboard, while the vessel was stranded, being formed into rafts and towed into the harbour. The defendants gave the plaintiffs notice of abandonment, and subsequently, on conditions not material to the present report, it was admitted by the plaintiffs that in consequence of the stranding and damage thereby received the ship became a constructive total loss on June 16.

The gross freight due under the bill of lading, at the chartered rate, after adding an agreed amount for one day's demurrage, was 4279*l.* 6*s.*; but the managing owners, acting on behalf of the defendants, on July 25, accepted 2227*l.* 19*s.* 5*d.* from R. Wade, Sons & Co. in settlement of their liability for freight, the balance, 2051*l.*, 6*s.* 7*d.*, being made up of amounts admitted to be rightly deducted except the two above-mentioned sums of 1677*l.* 19*s.* 10*d.* and 339*l.* 4*s.* 9*d.*

The question for the opinion of the Court was, whether, as the plaintiffs contended, the defendants were bound to pay to them, or to account to them, for 4279*l.* 6*s.*, the gross bill of lading freight, less the admitted items, or whether, as the defendants contended, the plaintiffs were only entitled to the balance of the freight after deducting the sums of 1677*l.* 19*s.* 10*d.* and 339*l.* 4*s.* 9*d.*

On June 26, 1895, the action was tried by Bruce J. on an agreed statement of facts to which was annexed—the charter-party, the bill of lading, the policy of insurance, an account of the amount of disbursements at Pensacola, and the note given by

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the master in respect of them; an account of the disbursements at Norfolk, and the draft given by the master in respect of them; a copy of the protest on stranding at West Hartlepool; account shewing how the sum of 2051*l.* 6*s.* 7*d.*, deducted from the gross freight, was made up; correspondence constituting the agreement in respect of the conditions on which the vessel was taken to be a constructive total loss.

J. A. Hamilton, for the plaintiffs. The voluntary abandonment of the ship involved a cession of all incidents attaching to it, and, on the possession of the ship with her cargo, the underwriters acquired all the advantages resulting from the completion of the voyage: *Case* v. *Davidson.* (1) Subject, therefore, to the agreed deductions—that is, subject to the expenses of delivery subsequent to the casualty—the underwriters are entitled to retain the cargo against freight, that is the gross bill of lading freight, that being the amount properly payable on delivery of the cargo. The sum of 1677*l.* 19*s.* 10*d.*, advanced in accordance with the terms of the charterparty to the master for ship's disbursements at Pensacola, was a personal loan to the shipowner to enable him to finance his ship at the port of loading; and, on the true construction of the charterparty, the intention was that the whole freight should be payable and be collected in England, as in the case of *Manfield* v. *Maitland* (2), where the money advanced to the master by the merchant for the ship's disbursements was held to be a loan to be reimbursed by the owner, and for which the freighter had no insurable interest. On this ground it was distinguished in *Allison* v. *Bristol Marine Insurance Co.* (3), where the charterparty provided for the deduction of 5 per cent. for insurance, and, therefore, indicated an intention to treat the amount as an advance of freight.

The fact that the master's draft was in the hands of the consignees of the cargo was a mere accident, as it might have been negotiated through a bank; and no question of agency arises, as prior to the casualty the master was the agent for his owners and not for the underwriters: *Hickie* v. *Rodocanachi.* (4)

(1) 5 M. & S. 79.
(2) 4 B. & A. 582.
(3) 1 App. Cas. 209.
(4) 4 H. & N. 455.

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As regards the sum of 339*l.* 4*s.* 9*d.*, this clearly cannot be deducted from the freight, as the ship did not take all the coals she required at the port of loading, but filled up on her way at Norfolk, Virginia; and her master, in the ordinary way, drew a bill upon his owners, which would have been payable whatever happened to the ship.

Joseph Walton, *Q.C.*, and *Carver*, for the defendants. No doubt the plaintiffs as underwriters on ship are entitled, on settling as for a total loss, to have the benefit, in account, of the freight which has been received by the defendants as owners, on the discharge of the cargo: *Stewart* v. *Greenock Marine Insurance Co.* (1)—that is, to the freight earned after the abandonment: *Scottish Marine Insurance Co.* v. *Turner* (2); but the sum of 1677*l.* 19*s.* 10*d.* advanced to the master at Pensacola, and in respect of which the note was given, was subject to sea risk and insurable. It was in the nature of advance freight, not payable in England, and as such did not pass to the underwriters on the abandonment of the ship. The words "including insurance" in the charterparty indicate that the transaction was not a mere loan, but amounted to a payment on account of freight, as in *Hicks* v. *Shield* (3), where the clause ran: "Cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, but subject to insurance and 2*l.* 10*s.* per cent. commission."

If the master had collected the bill of lading freight this would have included the 1677*l.* 19*s.* 10*d.* already paid by the charterers to the shipowners, and, therefore, the machinery of the draft was introduced, as thereby the draft could be enforced by any holder against the freight, with the result that the freight to the extent of 1677*l.* 19*s.* 10*d.* ceased to belong to the shipowner, who was only entitled to the balance; and that balance is all that the underwriters can get when subrogated to the rights of the shipowner.

The 339*l.* 4*s.* 9*d.* has also rightly been deducted, as the coals put on board at Norfolk, Virginia, were necessary for the voyage, and, therefore, the disbursement on this account was necessary for earning the freight. The master could have enforced this

(1) 2 H. L. C. 159; 1 Macq. 328. (2) 1 Macq. 334.
(3) 7 E. & B. 633.

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claim by reason of his maritime lien under s. 1 of the Merchant Shipping Act, 1889 (1), and the plaintiffs are only entitled to the rights which belong to the defendants as owners: *Simpson* v. *Thomson*. (2) The shipowner is entitled to retain expenses in the nature of charges paid by him for the benefit of those to whom he has abandoned the ship: *Thompson* v. *Rowcroft* (3)—that is, the underwriters take the freight charged with the necessary expenses resulting from the loss: *Sharp* v. *Gladstone* (4); *Barclay* v. *Stirling*. (5)

J. A. Hamilton, in reply. The cases of *Thompson* v. *Rowcroft* (3), *Sharp* v. *Gladstone* (4), and *Barclay* v. *Stirling* (5) all shew that only expenses subsequent to abandonment can be deducted. Such expenses, the plaintiffs admit, may be properly deducted in this case; but the freight is not divisible: the 1677*l.* 19*s.* 10*d.* and the 339*l.* 4*s.* 9*d.* were due in respect of expenses which the shipowner had to pay to carry out the voyage prior to the abandonment.

[Reference was also made by counsel to the following: Carver on the Carriage of Goods by Sea, 2nd ed. p. 574, § 564: Arnould on Marine Insurance, 6th ed. pp. 974, 976; Benecke on Indemnity in Marine Insurance, pp. 392, 410.]

Cur. adv. vult.

July 5. BRUCE J. [After stating the facts already set out, the learned judge continued:—] The question in dispute in the action arises in respect of the two items which the defendants claim to deduct from the freight, namely, a sum of 1677*l.* 19*s.* 10*d.* paid at the port of loading in pursuance of a provision contained in the charterparty, and a sum of 339*l.* 4*s.* 9*d.* incurred for coals and other expenses at Norfolk, Virginia, necessary to enable the ship to proceed on her voyage.

The plaintiffs, as underwriters on hull and machinery, claim the freight as a benefit incident to the ship. No doubt, subject to a question hereafter to be considered as to the sum of 339*l.* 4*s.* 9*d.*, they are entitled to whatever is the amount of

(1) Now s. 167, sub-s. 2, of the Merchant Shipping Act, 1894.
(2) 3 App. Cas. 279.
(3) 4 East, 34.
(4) 7 East, 24.
(5) 5 M. & S. 6.

freight properly payable on delivery of the cargo. The first question to be determined is, What freight was under the circumstances of this case payable? In other words, Was the sum of 1677*l.* 19*s.* 10*d.*, which was paid at the port of loading, a sum which is to be taken as a payment on account of freight, or was it a payment which could, in accordance with the terms of the charterparty, be deducted from freight? The important clause in the charterparty is as follows: [The learned judge read clause 13, already set out, and continued:—] This clause, I think, contains words which shew that the parties considered that the advance was of such a nature as to be insurable—that is, that it was in the nature of a prepayment of freight and subject to sea risk.

It is true that the words "and cost of" are struck out, and the word "including" is substituted; but it does not seem to me that that affects the substance of the stipulation. It is agreed that the 2½ per cent., which it is stipulated the ship shall pay, shall cover the cost of insurance. But the amount to be paid for insurance is not material; the question is, Was the advance of such a nature as to be capable of insurance? I can give no meaning to the words "including insurance" in the charterparty unless I hold that the parties regarded the advance as subject to sea risk, and if so, it must be regarded as a payment on account of freight, and cannot be treated as freight still due from the defendants. I think, therefore, that the defendants are right in their contention as to the sum of 1677*l.* 19*s.* 10*d.*

As regards the sum of 339*l.* 4*s.* 9*d.*, the defendants contend that the right of the underwriters to the freight is subject to the expense of earning it, and that, as these disbursements were necessary for the completion of the voyage, the underwriters can only claim the balance of freight after deducting the sum in question. But I think that these disbursements cannot be said to have been incurred for the freight alone. They were expenses incurred by the master acting on behalf of his owners for the purpose of getting the ship home, and nothing that has occurred can, I think, have the effect of making the underwriters

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Bruce J.

liable for a debt of this nature. It is said that if the owners of the ship had not paid these disbursements, the claim in respect of them might have been enforced by the master, who would have had a maritime lien in respect of them. In answer to that argument, I think it is enough to say that I am not satisfied that the master ever did make any disbursements. The owners have themselves paid the amount due in respect of these disbursements, and no circumstances have existed, that I can discover, to give rise to a maritime lien or any lien on the ship or freight.

I hold, therefore, that as regards the sum of 1677*l.* 19*s.* 10*d.* the defendants are right in their contention; but I pronounce against their claim to deduct the sum of 339*l.* 4*s.* 9*d.* from the freight.

Solicitors for plaintiffs: *Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Batesons, Warr & Wimshurst, Liverpool.*

T. L. M.

[DIVISIONAL COURT.]

1895
July 2;
Aug. 8.

THE GAS FLOAT WHITTON No. 2.

Admiralty—Salvage—County Court—Jurisdiction—Gas Float—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476.

The plaintiffs obtained a salvage award in a county court, having Admiralty jurisdiction, for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat-shaped, and contained gas, which by its own elasticity supplied, day and night for about six weeks, the light raised above it.

On appeal by the defendants, the owners of the gas float, on the ground that, by reason of the subject-matter and locality, there was no jurisdiction :—

Held, by the Divisional Court (Sir F. H. Jeune President and Bruce J.), that, though the gas float was not a "ship" or "wreck" within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854, so as to be a subject of salvage under the latter section, there was Admiralty jurisdiction under s. 476 of that Act (extended to county courts by s. 3 of the County Courts Admiralty Jurisdiction Act, 1868), as such a structure, used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea, would have been within the jurisdiction of the Admiralty, if adrift upon the high seas, and was, therefore, by virtue of that section, also within the jurisdiction of the Admiralty when in the body of a county.

Semble. It is an essential part of the idea of a "ship" that she should be used or intended to be used in navigation, that is, in the transport by water of persons or things. The word "wreck" means something which formed part of a ship, including her apparel or her cargo.

APPEAL by defendants, the corporation of the Trinity House of Hull, against a decision of the judge of the county court of Yorkshire, holden at Kingston-upon-Hull, awarding salvage for services rendered in the River Humber by the plaintiffs to a gas float, the property of the defendants.

The amount of the claim (60*l.*) and the value of the property (600*l.*) were within the limited Admiralty jurisdiction conferred on the county court by virtue of the County Courts Admiralty Jurisdiction Act, 1868 (1); but it was contended on behalf of

(1) 31 & 32 Vict. c. 71, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this

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the defendants in the Court below, and on the appeal, that there was no jurisdiction by reason of the subject-matter and locality.

The learned county court judge held that the gas float was an automatic lightship, stored with gas for purposes useful to navigation, and, on the authority of the principles laid down in *The Mac* (1), a proper subject of salvage within the jurisdiction of a Court having Admiralty jurisdiction. He also held that, at the material time, the gas float came within the definition of "wreck," and, on the ground that the services were meritorious, though not attended with any risk, he awarded the plaintiffs the sum of 15*l.*

Sir Walter Phillimore, and *Sutton*, for the appellants (defendants).

Butler Aspinall, for the respondents (plaintiffs). (2)

[The size and description of the gas float, the weather at the time when, and the nature of the locality where, the services were rendered, the arguments of counsel and the material portions of the statutes bearing on the question of jurisdiction, fully appear from the judgment. In addition to the cases therein mentioned, the following were referred to in the Court below or on the hearing of the appeal: *The Neptune* (3); *The City of Chester* (4); *The Dowse* (5); *Everard* v. *Kendall* (6); *Allen* v. *Garbutt* (7); *Reg.* v. *Judge of City of London Court* (8); *The Zeta* (9); *The Boiler ex Elephant* (10); *The Cleopatra*. (11)]

Cur. adv. vult.

Act, the following causes (in this Act referred to as Admiralty causes):—

"(1.) As to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds."

(1) 7 P. D. 126.

(2) The Divisional Court, on the ground that the point involved was one of law (*The Delano*, ante, p. 40), overruled the preliminary objection taken by the respondents (plaintiffs), that as the appeal was against a finding of fact, namely, that the gas float was a ship used in navigation and also a wreck, it would not lie, no security for costs having been given (31 & 32 Vict. c. 71, s. 26), and the amount decreed being under 50*l.* (s. 31).

(3) 1 Hagg. Adm. 227, at p. 236.

(4) 9 P. D. 182, at p. 201.

(5) L. R. 3 A. & E. 135.

(6) L. R. 5 C. P. 428.

(7) 6 Q. B. D. 165.

(8) 8 Q. B. D. 609.

(9) [1893] A. C. 468.

(10) W. N. (1891) 52.

(11) 3 P. D. 145.

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THE GAS FLOAT WHITTON No. 2.

Aug. 8. SIR F. H. JEUNE, PRESIDENT. This is an appeal from a judgment of the learned judge of the Kingston-upon-Hull County Court.

The question at issue is whether the plaintiffs can claim in respect of salvage services alleged to have been rendered to what is termed, in the particulars of demand, the defendants' "Gas Float Whitton No. 2." There can be no doubt that, if the Whitton No. 2 is in law a subject of salvage in a river, salvage services were rendered in respect of it. It was stationed near Brough, in the Upper Humber, for the purpose of a beacon, and on December 21 or 22, 1894, by reason of a violent gale, it got adrift, and was driven on the 22nd towards the Lincolnshire coast, first touching Reeds Island, and eventually taking the ground on the Lincolnshire coast near a point, with a rocky bottom, to which it was said the tide would have carried it. The plaintiffs, who are waterside men, fastened ropes to it, gave it a lead away from the rocks, and so held it till the Trinity yacht came on the 23rd. After several efforts, in which the plaintiffs aided, the Trinity yacht succeeded in getting it off on the 29th.

The first question to be decided turns on the nature and character of the Whitton No. 2.

The Whitton No. 2 is used as a lighted buoy. It is a valuable structure, costing about 600*l*. From a sketch produced of it I should say that its hull bears some resemblance to that of a ship or boat. It is fifty feet long and twenty feet broad, and its two ends, which are similar, are shaped like the bow of a vessel. It is made of iron, and has no mast, stern-post, fore-post, or rudder. Its interior is occupied by a gas cylinder, built in it, with the entrance of a manhole only. The light is rigged on a pyramid of pieces of wood about fifty feet high, and the gas in the cylinder by its own elasticity supplies the light, day and night, for about six weeks. No one is ever stationed on it. Captain Fowler, the chairman of the Buoy Committee of the Trinity House, gave evidence, which was not contradicted, that it could not be used for any purpose of navigation, and that it was next to impossible to tow it.

The learned county court judge has held that the Whitton

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No. 2 is a ship or boat within the meaning of s. 458 of the Merchant Shipping Act, 1854, which was the Act in force at the time of the salvage. If so, under that section there is jurisdiction in the Admiralty Court to award salvage for services rendered in respect of her.

The definition of ship in s. 2 of the Merchant Shipping Act, 1854, does not assist us, because it is only "the word ship shall include every description of vessel used in navigation not propelled by oars." It does not, as Lord Coleridge said in *The Mac* (1), exclude other meanings of the word.

Nor is there any conclusive authority upon the point. In *Ex parte Ferguson* (2) it was held that a coble was a ship within the meaning of the Merchant Shipping Act, 1854. It is impossible, I think, to read the judgment of Blackburn J. and have any doubt on the matter. The learned judge said (3): "But the point which remains is this: It is said on behalf of the master and mate that the fishing coble cannot be a 'ship.' She is twenty-four feet long, she is not entirely decked over, she has two masts and a rudder, which are removable, and she may be propelled by four oars. She goes out well to sea; and, though the oars are used to get her out of harbour, they are merely auxiliary to the use of sails. It is said on behalf of the Board of Trade, that that is a 'ship.' The chief argument against that proposition is by referring to the interpretation clause (s. 2 of 17 & 18 Vict. c. 104), which says, '"Ship" shall include every description of vessel used in navigation not propelled by oars.' And the argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so: the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the

(1) 7 P. D. 126, at p. 128. (2) L. R. 6 Q. B. 280.
(3) L. R. 6 Q. B. 290.

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meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship.' I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purpose of this Act. Whenever the vessel does go to sea, whether it be decked or not decked, or whether it goes to sea for the purposes of fishing or anything else, it would be a ship. I take it that this was what the justices thought. The facts stated are, that this vessel, though of small size (of only ten tons burthen and only twenty-four feet long), yet goes out twenty or thirty miles to sea—does go there almost entirely with sails, does stay out many hours, as the affidavits state, and I think it is probable that it goes out for days and nights. This makes it impossible to say that it is not a sea-going vessel, and consequently a 'ship' coming within the Act without the aid of the interpretation clause."

The Mac (1) was a case which referred to a hopper barge. This barge had a cabin at each end, a bow, stern, and rudder, and was "steerable." It had no mast, except a pole which could be used for a small sail or to hoist a light on. It was usually moved by a tug, and was used for dredging purposes—that is to say, to carry out to sea and deposit the mud raised by dredgers. Sir Robert Phillimore held that there was no evidence that this hopper barge was used in navigation, and that therefore she was not a ship. But the Court of Appeal decided that she was a ship within the language of the Merchant Shipping Act, 1854. The view of their Lordships was, I think, that she was a ship in the common meaning of the word. Lord Coleridge said this, in terms referring to the definition of a ship cited from Horne Tooke in Todd's Johnson's Dictionary, "formatum aliquid, in contradistinction from a raft for the purpose of conveying merchandise, &c., by water, protected from the water and the weather." Brett L.J. said: "This case comes within the words of s. 458 of the Merchant Shipping Act, 1854, if they are read in their ordinary sense and without the assistance of the interpretation clause; but, as it seems to me, it falls also within that clause. In s. 458 the words

(1) 7 P. D. 38, 126.

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'ship' and 'boat' are used, but it seems plain to me that the word 'ship' is not used in the technical sense as denoting a vessel of a particular rig. In popular language, ships are of different kinds: barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water, built in a particular form, and used for a particular purpose. In this case the vessel, if she may be so called, was built for a particular purpose—she was built as a hopper barge; she has no motive power, no means of progression within herself. Towing alone will not conduct her; she must have a rudder, and, therefore, she must have men on board to steer her. Barges are vessels in a certain sense, and as the word 'ship' is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper barge is a 'ship.' She is not propelled by oars. The interpretation clause of the Merchant Shipping Act, 1854 (s. 2), does not limit the meaning—it enlarges it. This hopper barge is used for carrying men and mud, she is used in navigation—for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon barge capable of carrying 200 persons is towed down the River Mersey in order to put passengers on board vessels lying at the mouth, she would be used for the purposes of navigation, and I think it equally true that the hopper barge was used in navigation." Cotton L.J. said: "The first point is that the hopper barge is not a 'ship.' The interpretation clause does not confine the meaning of the word, it does not confine it simply to what is used in navigation. I think that the hopper barge is a 'ship' both within and without the interpretation clause. 'Ship' is a general term for artificial structures floating on the water; this is plain upon looking at the meanings given in Johnson's Dictionary; and it is to be observed that one of the meanings of 'boat' is therein stated to be 'a ship of a small size.' I think that the proper meaning is 'something hollowed out.' Some expressions of Blackburn J. in *Ex parte Ferguson* (1) may appear to support a different view: that learned judge seems at first sight to have been of opinion that a 'ship' meant a sea-going vessel; but I think that the remarks which he made must

(1) L. R. 6 Q. B. 280, at p. 291.

be read with reference to the subject-matter before him, and that he was merely explaining that the vessel in question was a 'ship.' It is plain, to my mind, that in order to be a 'ship' within the Merchant Shipping Act, 1854, a vessel need not be sea-going; it is only necessary to refer to s. 19 of that statute, which provides that British ships must be registered, except 'ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of such ships are resident.' I think that this shews that the hopper barge was a 'ship' within the Act. The question cannot depend on the circumstance whether she carries a cargo from port to port. She was propelled by towing, and she carried mud with a crew on board."

On the other hand, a raft of timber was held by Dr. Lushington not to be a ship within the meaning of 3 & 4 Vict. c. 65, where the words in s. 6 are, "Ship, or sea-going vessel": *Raft of Timber*. (1) In *Mayor of Southport* v. *Morriss* (2) the Court appear to have regarded it as essential that a vessel should be engaged in navigation within the ordinary acceptance of the term in order to bring it within the provisions of the Merchant Shipping Act, 1854.

Now, whether the question be, Is the Whitton No. 2 a ship in the ordinary meaning of the term, or is she used in navigation in the ordinary meaning of the term? the answer must, in either case, in my opinion, exclude her from the Merchant Shipping Act, 1854. I think that it is an essential part of the idea of a ship that she should be used or intended to be used in navigation—that is to say, in the transport by water of persons or things. I do not say that every structure used for transport is a ship because a raft may be a means of transport, but transport of some kind seems to me sine quâ non. It does not appear to me enough that the object in question should be used for purposes connected with navigation. It is possible that the view of the learned judge in the Court below, that she was used for the purposes of navigation because she contained gas for purposes which are useful for the purposes of navigation, was based on

(1) 2 Wm. Rob. 251. (2) [1893] 1 Q. B. 359.

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the words of Brett L.J., quoted above, that "to dredge up and carry away mud and gravel is an act done for the purposes of navigation." But I think the Lord Justice's language was intended to convey that the hopper barge, in carrying away the mud and gravel, was used in navigation, and, expressed in that sense, that is a proposition, to my mind, unquestionably correct. But the Whitton No. 2 is not used, or intended to be used, for the transport of anything. In this respect I cannot see how it differs from an ordinary lighted buoy.

There may, of course, be questions, and in some cases difficult questions, whether a vessel which has been, or may be, used in navigation becomes divested of that character by disuse or non-use. As to a lightship which may have been used in, or constructed for, navigation, it may be a question whether she has ceased to be a ship when she becomes an inhabited beacon. A coal hulk (see *European and Australian Royal Mail Co.* v. *Peninsular and Oriental Co.* (1)), or a training ship, after having once been actively employed, may, or may not, according to their use, pass out of the category of ships. H.M.S. *Victory* has long been a curiosity and a memorial. I do not say whether she has ceased to be a ship. But, if being navigated, or having been constructed for the purpose of navigation, or being capable of navigation, be the test, the Whitton No. 2 never was, is not, and could not be, a ship.

Then it was argued that the Whitton No. 2 might be regarded as wreck within the meaning of s. 458. But this would, I think, give a more extended meaning to "wreck" than is consistent with the authorities. The definition in *Constable's Case* (2) is "wreccum maris significat illa bona quæ naufragio ad terram appelluntur"—that is to say, wreck is something which formed part of a ship, including her apparel or cargo. In Mr. Stuart Moore's book on Foreshore and Seashore can be found extracts from many charters from which the same conclusion as to the meaning of the word "wreck" is to be drawn. In *Palmer* v. *Rouse* (3) timber floating at sea was considered not to come within any of the classes of wreck, as not having been at sea in

(1) 14 W. R. 843. (2) 5 Rep. 106 a.

(3) 3 H. & N. 505.

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a ship and separated from it by some peril. Many more authorities to the same effect might be referred to.

But this does not exhaust the case. It remains to be considered whether the Whitton No. 2 is not the subject of salvage apart from the jurisdiction conferred by s. 458 of the Merchant Shipping Act, 1854.

It is no doubt true that the Admiralty Court Act, 1840, s. 6, gave, as was held by Dr. Lushington in the case above referred to, jurisdiction within the body of a county only in the case of ships or sea-going vessels. But by the Act 9 & 10 Vict. c. 99, s. 40, this limitation was removed (see Edwards on the High Court of Admiralty, p. 189), and s. 476 of the Act of 1854 provides as follows: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land." Probably this section did not give to the Court of Admiralty jurisdiction within the body of a county in respect of any goods or articles as to which it had not previously jurisdiction on the high seas. In *The Johannes* (1) Dr. Lushington said of the 476th section: "I believe that this section was intended for the purpose only of giving the Court of Admiralty jurisdiction in certain cases in which that jurisdiction had been before disputed by reason that the service had been performed wholly or in part on land within the body of a county." But this section certainly extended the jurisdiction of the Admiralty Court in salvage to places within counties in respect of all property as to which it had jurisdiction at sea. This jurisdiction of the High Court of Admiralty was extended to the county courts by s. 3 of the County Courts Admiralty Jurisdiction Act, 1868.

It was argued by counsel for the defendants that even if under s. 476 the High Court of Admiralty could have had jurisdiction in respect of the Whitton No. 2 at sea, such a structure being placed and used in a river never was, and is not, a subject of

(1) Lush. 182, at p. 189.

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salvage. In support of this view they chiefly relied on the case of *Nicholson* v. *Chapman*. (1) In this case, which was decided in 1793, it was held that a person who found, and conveyed to a place of safety, timber which, having been placed in a dock on the bank of a navigable river, was carried by the tide and left at low water on a towing-path, had no lien at common law upon it for his trouble or expense. This case appears to have been decided with reference only to the nature of the locality in which the property was lost and found. In the judgment of the Court occurs the following passage (2): "The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompence is due for the saving, and that our law has also provided that this recompence should be a lien upon the goods which have been saved (vide *Sutton* v. *Buck* (3)). Goods carried by the sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence for the encouragement of those who engage in so dangerous a service. Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld. (4) But see how very unlike this salvage is to the case now under consideration. In a navigable river, within the flux and reflux of the tide, but a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the

(1) 2 H. Bl. 254.
(2) 2 H. Bl. 257.
(3) 2 Taunt. 302.
(4) 1 Ld. Raym. 393; 2 Salk. 654, pl. 2.

mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated."

From the subsequent reference to craft moored in the river it would seem, and it is worthy of remark, that the Court did not intend to base its judgment on the fact that the goods in question were not in the nature of ship, boat, or cargo. The reference to the position and risks of property lying in rivers as opposed to those at sea seems to be intended to explain why salvage services are not recognised by the common law in the same way as they are by the law maritime. But the fact that they are not was, as the law then stood, sufficient ground for the decision of the Court. A lien implies that in some way the amount of the reward, on account of the non-payment of which the lien is allowed, can be ascertained. But how could any payment due for saving the timber in the case of *Nicholson* v. *Chapman* (1) be ascertained or enforced? It could not be enforced at common law, as there was no contract, express or implied. It could not be enforced in the Court of Admiralty, because the salvage services were performed in the body of a county. The case, therefore, seems to decide only this, that although the common law, as Lord Holt held in *Hartfort* v. *Jones* (2), recognises a lien for salvage in some cases, it will not do so when no payment for the services rendered is legally due, and that for services voluntarily rendered in preserving property astray in a river no payment is legally due, any more than for such services if rendered to property in a similar position on land.

If this view of *Nicholson* v. *Chapman* (1) is correct, it would follow that the extension of Admiralty jurisdiction to inland waters has materially altered the law which it enunciates. I cannot help thinking that is the real meaning of the observation attributed to Willes J. in *Vivian* v. *Mersey Board.* (3) It is true that the case of *The Carrier Dove* (4), referred to by that

(1) 2 H. Bl. 254.
(2) 1 Ld. Raym. 393.
(3) L. R. 5 C. P. 19, at p. 28.
(4) 2 Moo. P. C. (N.S.) 243.

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learned judge as shewing that, notwithstanding the case of *Nicholson* v. *Chapman* (1), there is no distinction between river and sea salvage, bears only on the quantum of salvage recovered; but it may well be that the learned judge intended to point out that *Nicholson* v. *Chapman* (1) did not now express the law in the case of river salvage, and that, in truth, the distinction between river and sea salvage has, by the extension of the Admiralty jurisdiction, been abolished. In such cases as that of *The Zeta* (2), a barge which drifted from her moorings on the Thames, it is clear that salvage could now be obtained; whereas according to the language employed in *Nicholson* v. *Chapman* (1) it could not. I think, also, that Blackburn J. and Lush J., in pointing out in *Hingston* v. *Wendt* (3) that in *Nicholson* v. *Chapman* (1) the defendant was "a mere volunteer in saving the goods," indicated their opinion that what that case decided was that such a person did not acquire a lien at common law, and I attribute the same effect to the observations of Lord Blackburn in *Aitchison* v. *Lohre.* (4)

If, then, the estuary of the Humber may in all respects for the purposes of Admiralty jurisdiction of salvage be treated as the high seas, the question which remains is, Can an article of property, not being a ship or cargo, be the subject of salvage on the high seas?

There is, so far as I am aware, no direct English authority to this effect, although text-writers of eminence have indicated opinions pointing in that direction. (5)

There was a case in which the caisson of a dock which got adrift in Gravesend Reach (6) was dealt with as the subject of salvage. But, apart from the consideration that no question of jurisdiction was in that case raised on the pleadings, it would appear that this caisson before being lost was in tow of a steamer, and may probably, therefore, have been considered as cargo.

The rule that salvage is applicable to Royal fish is perhaps too special to form the subject of a general inference; but it is to be

(1) 2 H. Bl. 254.
(2) L. R. 4 A. & E. 460.
(3) 1 Q. B. D. 367, at p. 373.
(4) 4 App. Cas. 755, at p. 760.
(5) See Kennedy on Salvage, p. 2.
(6) *The Owners of a Caisson*, Pritchard's Maritime Digest, 3rd ed. vol. ii. p. 2078, No. 1139; Shipping Gazette, May 10, 1876.

remarked that in the case of the *Lord Warden of the Cinque Ports* v. *The King* (1), Dr. Phillimore bases this right of salvage on the legal theory that Royal fish before, and at the time of, their capture are the property of the King. In a case in the District Court of the United States for the Southern District of New York, *A Raft of Spars* (2), it was held that an Admiralty suit could be sustained in respect of a raft of sixteen spars which had floated out of a basin on the East River, and was drifting to sea half a mile from the shore. The learned judge, Betts J., who tried the case, and who was, as I have been informed, a careful judge, and one of very great experience in Admiralty matters, appears to have had no doubt that the English Courts would award salvage in such a case. I find, also, that in a later case, decided in 1890, a raft of timber found drifting with the tide on deep water, in a harbour, and out of the control of the owners, was held to be a subject of salvage: *Bywater* v. *A Raft of Piles.* (3)

On the other hand, there is no authority, as far as I can ascertain, to shew that the jurisdiction of the Admiralty as to salvage is limited so closely to a ship and her cargo as to exclude a structure used in connection with navigation, and exposed in the ordinary course of its use to the perils of the sea; and it appears to me probable that the exclusive mention of ship and cargoes as subjects of salvage is due to the fact that the case of anything else of a nautical character, except a buoy or lightship, being in need of salvage service on the high seas, is almost, if not quite, unimaginable.

The rule—not perhaps a strictly logical rule—that the personal property of passengers is not the subject of salvage, seems to rest on the identification of the passenger with his articles of personal use: see *The Willem III.* (4)

It is not necessary, in this case, to go as far as the American Courts appear to have gone, and to hold all property imperilled in waters over which the Admiralty Courts have jurisdiction to be the subject of salvage; but it appears to me that no

(1) 2 Hagg. Adm. 438, at p. 441.
(2) 1 Abbott Adm. 485.
(3) D.C.D. Wash. 42 Fed. Rep. 917; United States Digest (1891) 1692.
(4) L. R. 3 A. & E. 487.

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reasonable distinction can be drawn between a ship and a structure moored in the sea to direct the course of ships. Both are properly connected with navigation—the one directly, the other indirectly, no doubt, but to such a degree that beacons at sea have always been under the government of the Admiralty: *Crosse* v. *Diggs.* (1) Both are necessarily exposed to sea peril, which may subject those who save them to special exertion or danger. The gas float is in this respect in exactly the same position as a ship at anchor. It is certainly in the interests of navigation and commerce that beacons, valuable in themselves and for their utility, should be preserved from destruction. I think, therefore, that the Whitton No. 2 would have been a subject of salvage if stationed on the high seas, and is not less so because moored in the estuary of the Humber.

I am authorized to say that Bruce J. concurs in this judgment.

Appeal dismissed with costs; leave to appeal.

Solicitors for plaintiffs: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Wilson & Sons, Hull.*

(1) 1 Sid. 158.

T. L. M.

Dicta of LOPES, L.J., at p. 334, *applied.* EDWARDS *v.* EDWARDS. [1949] 2 All E.R. 145.

Followed. EDWARDS *v.* EDWARDS [1950] P. 8

[IN THE COURT OF APPEAL.]

C. A.
1895
June 28; *July* 1, 2; *Aug.* 7.

RUSSELL *v.* RUSSELL.

Restitution of Conjugal Rights—Cruelty—Judicial Separation—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 22—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although persisted in, is not sufficient evidence of legal cruelty to support a petition by the husband for judicial separation. So *held* by the majority of the Court of Appeal (Lindley and Lopes L.JJ., Rigby L.J. dissenting).

But *held*, by the Court of Appeal, that such conduct on the part of the wife justified the Court in refusing to accede to her petition for restitution of conjugal rights.

The effect of the 5th section of the Matrimonial Causes Act, 1884, which enacts that a respondent who fails to comply with a decree for restitution of conjugal rights shall be deemed guilty of desertion without reasonable cause, and that a suit for judicial separation may be forthwith instituted, is to give the Court power to refuse a decree for restitution whenever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case.

APPEAL from a judgment of Pollock B.

The petition in this case was presented by the Countess Russell against her husband, Earl Russell, asking for a restitution of conjugal rights. The respondent pleaded that the petitioner had brought against him the charge of having committed an unnatural offence, and that she persisted in such charge, and that for that reason she was not entitled to require him to cohabit again with her; and by way of counter-claim he asked for a judicial separation from the Countess on the ground of the cruelty committed by her in making such charge.

The material facts which led to the presentation of the petition were shortly as follows: The petitioner and respondent were married in February, 1890, and they separated by mutual consent in the following May. They afterwards lived together for a short time; but in June, 1890, they separated again for a period of three months, after which they never cohabited again. In November, 1890, the Countess filed a petition against her husband for judicial separation, charging her husband with many

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acts of cruelty; and among other things she charged him with committing an unnatural criminal offence with a third person. At the trial of this petition the jury acquitted the respondent of all the charges alleged, and the petition was dismissed and the respondent's character entirely vindicated. Notwithstanding this verdict, the Countess deliberately persisted in charging him with the criminal offence alluded to; and this she did on several occasions by word of mouth, and by letters addressed to several members of his family, and other persons, and she refused to retract or apologise. In particular, in an interview with the editor of the *Hawk* newspaper, she reiterated the charge against her husband, and intimated that, had the opportunity been afforded her, she could have established it.

The present petition and counter-claim were tried before Pollock B. and a special jury in April, 1895. The learned judge at the conclusion of his summing-up asked the jury, first, whether Lady Russell had been guilty of cruelty; and, secondly, whether in her conduct and correspondence since the trial in 1891 she was acting bonâ fide. The jury answered the first question in the affirmative, and the second in the negative. The learned judge dismissed the wife's petition, and made a decree for judicial separation in favour of the husband. Lady Russell appealed.

Murphy, Q.C., and *Barnard* (*Le Bas* with them), for the appellant. The two questions in this case must be decided on the same principle, for if it be established that there is no ground for a decree for judicial separation, the respondent has no ground for resisting a decree for restitution of conjugal rights. There must be some real matrimonial offence proved, otherwise the Court has no discretion to refuse restitution of conjugal rights. That has been the uniform principle of law laid down in the cases both before and since the Matrimonial Causes Act, 1857: *Otway* v. *Otway* (1); *Barlee* v. *Barlee* (2); *Holmes* v. *Holmes* (3); *Westmeath* v. *Westmeath* (4); *Bray* v. *Bray* (5); *Dysart* v.

(1) 2 Phill. 95.
(2) 1 Add. 301.
(3) 2 Lee, 116.
(4) 2 Hagg. Ecc. Supp. 1, 56, 72.
(5) 1 Hagg. Ecc. 163.

Dysart (1); *Furlonger* v. *Furlonger* (2); *Oliver* v. *Oliver* (3); *Neeld* v. *Neeld* (4); *Seaver* v. *Seaver* (5); *Greenway* v. *Greenway* (6); *Burroughs* v. *Burroughs.* (7) Neither the Matrimonial Causes Act of 1857, nor the recent Act respecting restitution of conjugal rights, 47 & 48 Vict. c. 68, has given any fresh discretion to the Court. The real question, therefore, is whether the appellant in this case has committed any ecclesiastical offence which will support a decree for judicial separation. The only evidence against her is the fact that she accused her husband of an unnatural crime, which it is said amounts to legal cruelty. But no decision has gone so far. It has repeatedly been laid down that to establish the charge of cruelty there must be actual danger to life, or limb, or to health, bodily or mental, or a reasonable apprehension of it. Passionate language or conduct that hurts the feelings is not cruelty. The Matrimonial Causes Act, 1857, s. 22, confines the Divorce Court to the same principles and rules which prevailed in the Ecclesiastical Courts before the Act. The law was so laid down by Lord Stowell in *Evans* v. *Evans* (decided in 1790) (8), and it has been followed ever since: *Oliver* v. *Oliver* (9); *Gale* v. *Gale* (10), where a charge of incest was held insufficient to constitute legal cruelty; *Curtis* v. *Curtis* (11); *Scott* v. *Scott* (12); *Milner* v. *Milner* (13); *Cousen* v. *Cousen* (14); *Milford* v. *Milford* (15); *Popkin* v. *Popkin* (16); *Pickard* v. *Pickard* (17); *Forth* v. *Forth* (18); *Rippingall* v. *Rippingall* (19); *Mytton* v. *Mytton* (20); *Durant* v. *Durant.* (21) In *Tomkins* v. *Tomkins* (22) Lord Penzance said that Lord Stowell's judgment in *Evans* v. *Evans* (8) was the great authority on the question of cruelty. In the present case the question of cruelty ought not to have been left to the jury. There was no such reiteration of the

(1) 3 Notes of Cases, 324.
(2) 5 Notes of Cases, 422.
(3) 1 Hagg. Cons. 361, 364.
(4) 4 Hagg. Ecc. 263.
(5) 2 Sw. & Tr. 665.
(6) 6 Notes of Cases, 221.
(7) 2 Sw. &. Tr. 303.
(8) 1 Hagg. Cons. 35.
(9) 1 Hagg. Cons. 361.
(10) 2 Rob. Ecc. Rep. 421.
(11) 1 Sw. & Tr. 192.
(12) 34 L. J. (P. & M.) 23.
(13) 4 Sw. & Tr. 240.
(14) 4 Sw. & Tr. 164.
(15) L. R. 1 P. & D. 295.
(16) 1 Hagg. Ecc. 765, n.
(17) 33 L. J. (P. & M.) 158.
(18) 36 L. J. (P. & M.) 122.
(19) 24 W. R. 967.
(20) 11 P. D. 141.
(21) 1 Hagg. Ecc. 733.
(22) 1 Sw. & Tr. 168, 170.

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charge by the appellant as would endanger the health of mind or body of her husband. She does not now persist in the accusation, and her desire for restitution of conjugal rights is a proof that she will not recur to it. Her husband did not treat the accusation as cruelty when it was first made, but waited to do so till the appellant presented her petition. With respect to what passed at the former trial, everything said or done at the trial was privileged: *Henderson* v. *Broomhead* (1); *Seaman* v. *Netherclift.* (2)

The Ecclesiastical Courts and the Divorce Courts have never acted upon the footing that an applicant for restitution of conjugal rights must come with clean hands; and after relief had been extended by the Matrimonial Causes Act, 1857, to cases of desertion, an applicant was held entitled to judicial separation, although her conduct might have conduced or led to her husband's misconduct: *Duplany* v. *Duplany* (3); *Sullivan* v. *Sullivan* (4); *Miles* v. *Chilton* (5); *Andrews* v. *Ross* (6); *Mackenzie* v. *Mackenzie.* (7)

Robson, Q.C., and *Bargrave Deane* (*Sir Henry James, Q.C.*, and *Llewellyn Davies*, with them), for the respondent, Earl Russell. This is a peculiar and extraordinary case. These charges were made by the petitioner with the knowledge that they were false. She never did believe them, and there was no pretence for making them. This is not merely a case of making false or reckless charges, but of making charges every one of which had been disproved. The petitioner wrote and told her husband that she had documentary evidence when there was none in existence. This was a false accusation, deliberately made to get money in order that she might live thereon apart from her husband. It is said that this conduct of the petitioner does not amount to legal cruelty, and authorities have been cited which it is unnecessary to dispute. For this is a kind of cruelty with which none of our tribunals have ever before been called upon to deal. The charge is more calculated than anything else to make it

(1) 28 L. J. (Ex.) 360.
(2) 1 C. P. D. 540.
(3) [1892] P. 53.
(4) 2 Add. 299.
(5) 6 Notes of Cases, 636.
(6) 14 P. D. 15.
(7) [1895] A. C. 384.

impossible for the parties ever to come together again. The allegation of incest made in *Gale* v. *Gale* (1) was a random accusation, made in passion and petulance, and was probably believed in. That is an utterly different thing to the accusations in this case, which were conceived with the worst of motives, and deliberately put forth, and repeated to relatives, and to the public in the action.

[LOPES L.J. All the evidence in the action ought to be obliterated from the mind on this question of the restitution of conjugal rights.]

One must consider an act with reference to its consequences, and no decent person could visit at a house where the husband and wife were living together after it, nor would any servant stay there. It is said that no injury to health has been proved or alleged. But though Lord Russell, being an unusually strong man, has not suffered in his health while he was living apart from the appellant, it would injure the health of any man to be forced to live with a woman who had made such a charge against him. There is no exhaustive definition of cruelty which is sufficient to exclude this case. It contains, at all events, many important elements of cruelty within the language of the authorities, such as acts destructive of the husband's character, position, and career, rendering it impossible for the duties of married life to be discharged, or for the parties to live together, and such as in the case of an ordinary person would probably lead to injury to health. That would be enough, just as a menace imputing danger of bodily harm is enough: *Mackenzie* v. *Mackenzie* (2); *Evans* v. *Evans* (3); *Pickard* v. *Pickard* (4); *Bray* v. *Bray*. (5) The Court in two cases has treated serious charges as very different from mere abuse. It has been held that treating a wife as a prostitute is legal cruelty: *Milner* v. *Milner* (6); *D'Aguilar* v. *D'Aguilar*. (7) These cases carry the definition beyond mere physical violence. The Court will hesitate to decree what is intolerable and wrong, nor compel a husband to

(1) 2 Rob. Ecc. Rep. 421.
(2) [1895] A. C. 384.
(3) 1 Hagg. Cons. 35.
(4) 33 L. J. (P. & M.) 158.
(5) 1 Hagg. Ecc. 163.
(6) 4 Sw. & Tr. 240.
(7) 1 Hagg. Cons. 134, n.

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endure such accusations, and will not countenance a species of blackmailing which would be punishable by penal servitude.

The real question may be thus stated: Has the petitioner so treated her husband, and so expressed her feelings towards him, as to cause a reasonable apprehension that the duties of married life could not be discharged, but married life would be impossible if an order for the resumption of married life were made? The Court has a discretion as to making the decree under s. 16 of the Matrimonial Causes Act, 1857, and it is its duty to exercise it in such a case as this: *Saunders* v. *Saunders* (1); *Stace* v. *Stace* (2); *Paterson* v. *Paterson* (3); *Kelly* v. *Kelly* (4); *Woodey* v. *Woodey* (5); *Moore* v. *Moore.* (6) The petitioner is not acting bonâ fide. Her present application is a mere sham; it is brought with the expectation that her husband will refuse to receive her, and that she will then be able to maintain a petition for judicial separation under 47 & 48 Vict. c. 68, on the ground of desertion, and obtain an allowance from him.

Murphy, Q.C., in reply.

Cur. adv. vult.

1895. Aug. 7. LOPES L.J. read the following judgment, in which Lindley L.J. concurred:—This is a most important case, and admittedly one of first impression; it is, therefore, with anxious care that the Court approaches its consideration and determination. It is a suit by the wife for the restitution of conjugal rights, which the respondent resists on the ground of his wife's cruelty. The jury found that the petitioner had been guilty of cruelty towards the respondent, and that, in her conduct and correspondence since the first trial, she had not acted bonâ fide—which means that she did not believe the charge made against her husband to be true. The cruelty set up may be thus stated—namely, that the wife, who had for two years at least been living apart from her husband, persisted in charging him with the commission of an unnatural criminal offence, of which he had been acquitted by the verdict of a jury, and which charge

(1) 1 Rob. Ecc. Rep. 549.
(2) 37 L. J. (P. & M.) 51.
(3) 3 H. L. C. 308, 317.
(4) L. R. 2 P. & D. 59.
(5) 31 L. T. (N.S.) 647.
(6) 3 Moo. P. C. 84.

she had refused to apologise for or retract. Two questions arise: first, Was legal cruelty established? If it was, the respondent is entitled to a judicial separation, and the wife fails in the suit for the restitution of conjugal rights. Second, If it was not, is the petitioner, in the circumstances of this case, entitled to a decree for restitution of conjugal rights? The facts of the case, so far as concerns the present inquiry, are not largely, if at all, in dispute. It is necessary, however, to state some of them, in order to make the judgment of the Court intelligible. The petitioner and respondent were married in February, 1890, and they separated in the following May. They then lived together for a short time, but in June they separated again for a period of three months. The three months went by and they never cohabited again. In November, 1890, the wife filed her petition for a judicial separation, charging her husband with many acts of cruelty towards her, and amongst them with having committed an unnatural criminal offence. In December, 1891, that petition was tried. The jury, after a long trial, acquitted the husband of the cruelty alleged, and his character was thereby completely vindicated. Then commenced the course of conduct on the part of the wife of which the respondent now complains. It may be thus described—that she deliberately persisted in charging him with the criminal offence of which the jury had acquitted him. She did this on several occasions by word of mouth, and by letters addressed to members of his family and others, and would not retract or apologise. In an interview which the petitioner had with the editor of the *Hawk* she reiterated her charge against her husband, and intimated that, had the opportunity been afforded her, she could have established it. The jury have found that the petitioner did not believe this charge to be true. If she did not, her repeating it is the more reprehensible. If she did, her desire now expressed to return to cohabitation with her husband is incredible. However, that she conducted herself in the way we have described is indisputable. Is this legal cruelty? This is the question the Court has to determine. The learned judge in the Court below has not defined legal cruelty, and has left it somewhat at large to the jury. The Court, in our judgment, ought to define it—we will not say exhaustively, but,

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at any rate, sufficiently for the purposes of this case. We define it thus: There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty. We propose to test the definition by some of the more important cases that have been decided on the subject. Sect. 22 of the Matrimonial Causes Act, 1857, says: "In all suits and proceedings, other than proceedings to dissolve any marriage, the Court shall proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have hitherto acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." It is material, therefore, to consider what, in the view of the Ecclesiastical Courts, constituted legal cruelty for which a divorce a mensâ et thoro could be obtained. *Evans* v. *Evans* (1), decided by Lord Stowell in 1790, is the leading case on this subject. As we read that case, no husband could be found guilty of legal cruelty towards his wife unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or so as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her, or cause actual injury to her mental or bodily health. In a word, he must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life, or limb, or mental or bodily health. There are some expressions in that most admirable judgment of Lord Stowell to which we would wish to refer. At page 38 the learned judge says: "What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent, surely, in any state of life, but they are not that cruelty against which the law can relieve." At page 39 the learned judge sums up what he had previously said thus: "These are

(1) 1 Hagg. Cons. 35.

negative descriptions of cruelty; they shew only what is not cruelty, and are yet, perhaps, the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke and other books of practice is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable." This was the state of the law in 1790, and we venture to say that the doctrine there enunciated as to what constituted legal cruelty has never been materially altered. At that time no amount of want of civility, rudeness, insult, or abuse, however gross, which did not affect life, limb, or mental or bodily health, or where there was not a reasonable apprehension of its so doing, was considered by the ecclesiastical tribunals to amount to legal cruelty, and that though the parties were at the time cohabiting. So far as we can ascertain, the authority of the case of *Evans* v. *Evans* (1) has never been questioned. It would be superfluous to cite the long course of decisions with regard to cruelty which have been decided since *Evans* v. *Evans.* (1) Before the Divorce and Matrimonial Act, 1857, and since the passing of that Act, the same rule with regard to what constitutes legal cruelty has been maintained, and has been followed by Sir Cresswell Cresswell, Lord Penzance, and Sir James Hannen; and Sir Charles Butt, in December, 1891, at the trial of the case of *Russell* v. *Russell* (2), when the present petitioner sued for a judicial separation on

(1) 1 Hagg. Cons. 35.

(2) Not reported.

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the ground of cruelty, said, in laying down the law to the jury, that cruelty had been very often defined as injury causing danger to life, or limb, or health, or causing reasonable apprehension of danger to life, or limb, or health; and it is, generally speaking, where the continuation of the conduct charged would be likely to produce injury, either bodily or mental, or injury to health without any physical violence, that this Court interposes to protect the wife. There is no case in the books where words alone, however violent, however galling, and even if imputing a crime of the most disgraceful kind, have been held per se to constitute legal cruelty, and this when the parties were cohabiting as husband and wife. The case of *Bray* v. *Bray* (1) is a case which, so far as we can discover, has never been cited or followed as an authority, and is contrary to *Gale* v. *Gale* (2), subsequently referred to. *Bray* v. *Bray* (1) was a decision only with regard to admitting an article. In *Milner* v. *Milner* (3) the assault was quite sufficient to shew that the husband was unable to control himself, and could not be trusted not to break out into violence towards his wife. In *Popkin* v. *Popkin* (4) a husband's attempts to debauch his own female servants, and in *Durant* v. *Durant* (5) the bringing by him of groundless and malicious charges against his wife's chastity, were only held to be acts of legal cruelty to the extent that it was said of them that they would weigh with the Court in conjunction with other charges. In *Popkin* v. *Popkin* (4) it was said: "The attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings." And in *Durant* v. *Durant* (5) the Court said: "If a person who had ill-treated his wife, and had been guilty of acts of violence and words of menace, and finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by

(1) 1 Hagg. Ecc. 163.
(2) 2 Rob. Ecc. Rep. 421.
(3) 4 Sw. & Tr. 240.
(4) 1 Hagg. Ecc. 765, n.
(5) 1 Hagg. Ecc. 733, 769.

reason of cruelty." By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect which it is unnecessary again to state. These Courts, and the law of this country, have not gone the length of recognising it as a substantive ground, but it is a fact amongst others per quod consortium amittitur. In *Oliver* v. *Oliver* (1) it is said: "Words of menace importing the actual danger of bodily harm will justify the interposition of the Court, as the Court ought not to wait until the mischief is actually done. But the most innocent and deserving woman will sue in vain for its interference for words of mere insult, however galling." Again, in *Gale* v. *Gale* (2), a charge of incest per se was held to be insufficient to constitute legal cruelty. Sir John Dodson, in his judgment, said: "Undoubtedly the charge of having committed incest is not per se sufficient to constitute legal cruelty; but coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form a part of the libel." *Birch* v. *Birch* (3) is worthy of notice. It was the petition of the wife for dissolution of the marriage on the ground of adultery coupled with cruelty, and was decided by Sir James Hannen in 1873. The cruelty relied on was of this nature. The husband frequently beat one of the children with great violence in the wife's presence, swore at and abused her, and refused her delicacies which her state of health required. She did not allege that she had ever been struck by her husband, or that any act of violence had been committed by him towards her. Sir James Hannen says: "I cannot, consistently with the authorities, hold that that establishes legal cruelty. I must hold by those views, which seem to have been taken by my predecessors, that the cruelty must be of such a character as to endanger the life, the limbs, or the health of the party claiming relief. In saying that it must be such as to endanger the health of the complaining party, it does not follow that it should be such as actually to reach that point so as to cause injury to health. If there be reasonable ground to believe that it will be persevered

(1) 1 Hagg. Cons. 361. (2) 2 Rob. Ecc. Rep. 421.
(3) 42 L. J. (P. & M.) 23.

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in so as to cause mischief, then the complaining party may bring it before the Court as constituting legal cruelty, for it is not necessary that he or she should wait until the mischief is done. But I cannot come to the conclusion in this case that the wife had any apprehension of personal violence." We proceed to deal with the cases upon which the respondent relies. We select the strongest of them. *Paterson* v. *Paterson* (1850) (1) has been strongly relied upon by the respondent. It was a Scottish case, and, although it was said that the general principle of the law as to divorce a mensâ et thoro was the same in England and Scotland, Lord Brougham, at the end of his judgment, says: "I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our laws in favour of the remedy." The same learned judge, at p. 328, says that if a man were continually charging his wife with every sort of immorality and criminal conduct, and there were not a shadow of foundation for those charges, made before her family, her friends, relatives, and servants, and in face of the world, there was little doubt that what then rested only upon opinions would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured and rendering life almost unbearable, the Courts of the country would extend the remedy of a divorce a mensâ et thoro. These, however, were obiter dicta, and were not necessary for the decision, and it is to be observed that the House of Lords, the Court of Session having pronounced for a divorce, reversed the interlocutor. Again, at p. 318, Lord Brougham says this: that the ground of the remedy is confined to personal violence is not the law of England, and certainly not the law of Scotland; the law is nearly, if not altogether, the same in the two countries; and that it is not true that the law of England either requires actual injury to the person or threat of such injury. We presume that this means that a reasonable apprehension of danger to life, limb, or health, bodily or mental, will suffice without any actual personal injury or the threat of it. We cannot think this case can be relied upon as a decision making the conduct of the wife in this case sufficient to constitute legal cruelty. Nor do we find in

(1) 3 H. L. C. 308.

subsequent cases that it has been cited or allowed to prevail as establishing such an extension of the remedy. Then there is the case of *Kelly* v. *Kelly* (1), which has gone as far as any case has gone in the direction contended for by the respondent. It was decided by the Judge Ordinary, Lord Penzance, and was in 1870 appealed to the full Court, consisting of Channell B. and the Judge Ordinary, and it was held that if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation. Previous cases were carefully considered, and Channell B., after reviewing the evidence, says, at p. 71: "In conclusion, we have no doubt whatever that the law was correctly laid down on the hearing of this case that the evidence warranted the conclusion of legal cruelty drawn from it; and, satisfied as we are of the extreme peril to which Mrs. Kelly's health was exposed, without any adequate fault of her own, we think that the interference of this Court was justified and necessary, and the appeal should be dismissed." The Judge Ordinary, at p. 72, says: "These, then, are the grave misdeeds which, according to the argument of the appellant, are to warrant this Court in deciding that Mrs. Kelly is to return to her husband and be subject again to that discipline which, in the opinion of all who saw her when she last escaped from it (an opinion, be it remembered, that Mr. Kelly does not even in argument question), would end in her paralysis or madness." Again, at p. 76: "The health and safety of the wife is no doubt the leading consideration," and "So much injustice, so much perversion of mind, such abiding rancour for so trifling a cause; so much deliberate oppression under provocation so slight; moral chastisement so severe, administered with so much system—maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences—and all to extort confession of motives of which there is no proof, and force repentance without consciousness of wrong, will probably never be exhibited

(1) L. R. 2 P. & D. 59.

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again." That the decree proceeded on the ground of the great danger to the health of Mrs. Kelly is beyond controversy. In the case we are now considering no injury to health or reasonable apprehension of it is alleged, or proved, or even suggested. If the point had been raised the jury ought to have dealt with it, and it should have been left to them. This Court cannot now say that there must be injury to the husband's health, and act upon any such inference. *Kelly* v. *Kelly* (1), therefore, cannot be relied upon by the respondent. We do not know of any other other case to which it is necessary to refer. The present case is a case where the cruelty alleged is cruelty by the wife towards the husband: the difference of the sexes makes no essential difference in the principles applicable to the case. Dr. Lushington said, in *Furlonger* v. *Furlonger* (2): "Generally speaking, that would be cruelty if practised by a wife towards her husband which would be held to be cruelty if done by him towards her. I say generally speaking, for I think there must be some distinctions necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from the wife's violence. Still the same great rule of danger to life or limb must prevail; in these as in other cases of the same genus, necessary protection is the foundation of all separation." Mr. Deane, in his very able argument for the respondent, ventured on a definition of legal cruelty. He said the test was "whether the spouse complained of had so treated the complaining spouse and so manifested his or her feelings towards her or him as to cause a reasonable apprehension that the duties of married life could not be discharged, but married life would be unbearable if an order was made that married life should be resumed." Mr. Deane admitted that there was no case in the books which had so far extended the doctrine of legal cruelty. We are not prepared in the face of such a consistent body of authority arrayed against it, proceeding from the most eminent judges who have ever adorned the tribunals dealing with the subject, to authorize such a departure. If such an extension of the remedy is to be allowed, it seems to us that if it is for the legislature, or at any rate for the ultimate

(1) L. R. 2 P. & D. 59. (2) 5 Notes of Cases, 422.

Court of Appeal, to take this important step in advance. It is said this is an exceptional case, and so it may be; but if it is held that the conduct of the wife here constitutes legal cruelty, it would be difficult logically to say that any spouse, who leaves the other spouse and charges him or her, and persists in so doing, with any serious criminal offence—namely, murder or larceny—without any justification for so doing, was not guilty of legal cruelty, for words used without any suggestion of danger to life, limb, or health, and thereby entitled to a divorce a mensâ et thoro, and, if coupled with the adultery of the husband, to a divorce a vinculo. Adhering to the definition of legal cruelty which for the purposes of this case we have laid down—namely, that there must be danger to life, limb, or health, present or proximate, by which we mean a reasonable apprehension of it, to constitute legal cruelty—we come to the conclusion that there was in this case no evidence of legal cruelty which ought to have been left to the jury, and that the respondent is not, therefore, entitled to the decree for a judicial separation which he prays in his answer.

We come now to the question of the wife's right to a decree for restitution of conjugal rights. Her case is simply this—namely, that unless her husband is entitled to a decree for divorce or separation she is entitled as a matter of course to a decree for restitution. She contends that the Court has no discretion in the matter and cannot by law refuse her relief in the case supposed, however detestable her conduct may have been and although it is plain that her real object is not to live with her husband, but to procure a separation from him and to compel him to make her an allowance. These are startling propositions, and they require careful examination. It will be convenient first to ascertain the ecclesiastical law on the subject before the passing of the Matrimonial Causes Act, and then to inquire what modifications in that law were introduced by that Act or have been made since. By the ecclesiastical law of this country, which was founded on the canon law, marriage has long been considered indissoluble. But judicial separation could be obtained by either party for adultery or cruelty on the part of the other. Unless, however, a judicial separation could be pronounced,

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the obligation of both husband and wife to live together was invariably recognised and was rigorously enforced. There are numerous cases in the books in which restitution of conjugal rights has been decreed at the instance of sometimes a husband and sometimes a wife whose conduct was unbearable, though falling short of cruelty in the technical sense of the word. See, inter alia, *Holmes* v. *Holmes* (1); *Oliver* v. *Oliver* (2); *Dysart* v. *Dysart* (3); *Simmons* v. *Simmons* (4); *Hayward* v. *Hayward* (5); *Rippingall* v. *Rippingall.* (6) The law on this subject will be found carefully investigated in *Dysart* v. *Dysart* (3), and in a case which arose in Ireland in 1846, and to which we will refer. It is *Seaver* v. *Seaver* (7), which was decided first in the Consistory Court of Dublin and afterwards, on appeal, in the Court of Delegates. In this case both husband and wife had committed adultery. Neither, therefore, could obtain a divorce a mensâ et thoro from the other, and it was held that the wife was entitled to a decree for restitution of conjugal rights. All the other authorities were there examined, and it was laid down in the clearest language that the ecclesiastical law of England recognised no middle state in the relation of husband and wife between that of consortium vitæ and divortium a mensâ et thoro. It was in vain contended that in such a case as that before it the Court ought not to interfere at the instance of either party against the other. The Court held that, although the wife had committed adultery, yet she was entitled to a decree for restitution of conjugal rights so long as the relation of husband and wife subsisted, and no decree for separation could be pronounced against her. Such we take to have been settled law previously to 1857, when the Matrimonial Causes Act was passed. Cases were referred to in which the Court allowed facts to be pleaded in answer to a suit for restitution of conjugal rights, although those facts would not have justified a decree for separation: *Moore* v. *Moore* (8); *Stace* v. *Stace* (9); and *Woodey* v. *Woodey.* (10) But,

(1) 2 Lee, 116.
(2) 1 Hagg. Cons. 361.
(3) 3 Notes of Cases, 324.
(4) 1 Rob. Ecc. Rep. 566.
(5) 1 Sw. & Tr. 81.
(6) 24 W. R. 967.
(7) 2 Sw. & Tr. 665.
(8) 3 Moo. P. C. 84.
(9) 37 L. J. (P. & M.) 51.
(10) 31 L. T. (N.S.) 647.

although there are expressions in the judgments in those cases which point to a difference between suits for restitution and suits for separation, as regards particularity and certainty of pleading, and even cogency of evidence (*Simmons* v. *Simmons* (1)), those cases do not warrant the inference that the Court could or would refuse to decree restitution by reason of conduct falling short of adultery or cruelty in the technical sense. The question whether the Ecclesiastical Court had a discretion to refuse a decree for restitution on the ground of misconduct short of adultery or cruelty sufficient to warrant a decree for separation has been more than once considered, and we can find no case in which the Court ever did refuse a decree for restitution where there was no sufficient ground for separation. In *Seaver* v. *Seaver* (2) the Court considered it had no discretion. (See also *Westmeath* v. *Westmeath* (3); *Simmons* v. *Simmons* (4); *Rippingall* v. *Rippingall.* (5)) In *Dysart* v. *Dysart* (6) Dr. Lushington would not go so far as to say that extraordinary and unforeseen combinations and circumstances might not justify the Court in holding its hand and not assisting either party; but he said in effect that such a course could only be justified on the improbability of safe cohabitation. Improbability of peace and happiness would not be sufficient. In none of the cases to which we have alluded did the question arise as to the right of husband or wife to a decree for restitution where the petitioner did not bonâ fide desire to resume cohabitation. The observations of Dr. Lushington in *Simmons* v. *Simmons* (1) and in *Dysart* v. *Dysart* (6) on the motives of the petitioner do not touch this point, which we pass over for the present, although we shall return to it.

We pass now to the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85). Sects. 2 and 6 transfer the jurisdiction previously exercised by the Ecclesiastical Courts in matrimonial matters to the new Court created by that Act, and called the Court for Divorce and Matrimonial Causes. A new ground for separation—namely, desertion without cause for two years and upwards—was

(1) 1 Rob. Ecc. Rep. 566, at p. 567.
(2) 2 Sw. & Tr. 665.
(3) 2 Hagg. Ecc. Supp. 1, 57.
(4) 1 Rob. Ecc. Rep. 566.
(5) 24 W. R. 967.
(6) 3 Notes of Cases, 324.

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introduced by s. 16, and by s. 17 the new Court is empowered upon petition to make a decree for restitution of conjugal rights or judicial separation on being satisfied of the truth of the allegations contained in the petition, and that there is no legal ground why the same should not be granted. The use of the words "may decree," and not "shall decree," suggests an intention on the part of the legislature to confer on the Court a discretion as well as a power; but s. 22 shews, we think, that no discretion which was not possessed by the Ecclesiastical Courts was intended to be conferred on the new Court. The effect of that section is that the principles and rules acted on by the old Courts in cases of restitution and separation are to be followed by the new Court, subject to the creation of the new ground for separation by s. 16, and to the new procedure by petition introduced by s. 17, and to any rules which may be made under the authority of the Act. This construction of the sections is in accordance with *Julius* v. *Bishop of Oxford* (1), and with decisions since the Act in suits for restitution of conjugal rights. In *Burroughs* v. *Burroughs* (2) Sir Cresswell Cresswell, and in *Scott* v. *Scott* (3) Lord Penzance, held that in a suit for restitution nothing short of a ground for separation afforded a defence to the respondent. In the recent Scottish appeal of *Mackenzie* v. *Mackenzie* (4) Lord Herschell expressed great doubt whether the rule not to refuse a decree for restitution of conjugal rights where no separation could be decreed was as inflexible and free from exception as the Ecclesiastical Courts held it to be. But, having regard to the numerous and weighty decisions in those Courts, and to s. 22 of the Divorce Act, and to the decisions upon it, we are not prepared to say that the law can be judicially held to be less rigid than we have stated, except in some cases which will be noticed presently. The only other alterations which have been made in the old law relating to suits for restitution of conjugal rights have been made by the Judicature Acts and by 47 & 48 Vict. c. 68. The effect of the Judicature Acts has been indirect; but, at the same time, very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void

(1) 5 App. Cas. 214.
(2) 2 Sw. & Tr. 303.
(3) 34 L. J. (P. & M.) 23.
(4) [1895] A. C. 384.

by the Ecclesiastical Courts: see *Westmeath* v. *Westmeath*. (1) But when it was settled, as it ultimately was (see *Besant* v. *Wood* (2)), that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a Division of the High Court and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution: see *Marshall* v. *Marshall* (3); *Clark* v. *Clark*. (4) The Judicature Acts, however, have not altered the general principles on which the Ecclesiastical Courts acted in suits for restitution except in the particular to which we have alluded; and the alteration in the law as to separation deeds has really no bearing on the present case. We have alluded to it simply to shew that we have not overlooked it.

There remains for consideration the Act 47 & 48 Vict. c. 68, which was passed expressly to amend the law as to the restitution of conjugal rights in England. The Act in terms relates only to the consequences of not obeying a decree for restitution when made; it does not in terms refer in any way to the grounds upon which such a decree can be refused. The old process of attachment for enforcing obedience to such a decree when pronounced is abolished (s. 2). In lieu of that process the Court is empowered, if the respondent refuses to obey the decree, to order a proper provision to be made for the wife if she is the petitioner (s. 2), or for the husband if he is petitioner (s. 3). In addition, however, to this, it is enacted by s. 5 that a respondent who refuses to obey the decree shall be deemed guilty of desertion without reasonable cause, and that a suit for separation may be forthwith instituted, although two years may not have elapsed since failure to comply with the decree. It becomes most important, therefore, to consider what is the effect of s. 5 of the Act of 1884. In our judgment, it has materially altered the old law as to restitution of conjugal rights, and has given the

(1) 2 Hagg. Ecc. Supp. 1, 115.
(2) 12 Ch. D. 605.
(3) 5 P. D. 19.
(4) 10 P. D. 188.

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Court a power to refuse a decree which it had not before. By s. 16 of the Matrimonial Causes Act of 1857 desertion is for the first time made a ground for judicial separation, and is not governed by the old ecclesiastical law; but it is no ground for a sentence of judicial separation unless the desertion is without cause. If the wife were petitioning for a judicial separation here on the ground of desertion against her husband, her conduct towards him would disable her from contending that the desertion was without cause, and she would fail in her suit. By s. 5 of the Act of 1884 disobedience to a decree for restitution of conjugal rights is made equivalent to desertion without cause. If, therefore, the petitioner obtains a decree for restitution of conjugal rights, she will be at once entitled to institute a suit for judicial separation for the statutory desertion created by the Act of 1884, although she could not, under s. 16 of the Matrimonial Causes Act, 1857, have obtained such a decree unless it had been desertion without cause. We cannot think that such a result was ever intended, or that the necessity of proving absence of reasonable cause was intended to be taken away. It seems to us that since 1884, and by necessary implication, the Court must have power to refuse a decree for restitution wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case. The practical consequence of this view of the Act of 1884 is that neither party obtains relief. Not the wife, because her conduct justifies the husband in saying that he has reasonable cause for refusing to live with her; not the husband, because his wife's conduct, bad as it has been, does not amount to cruelty in the legal sense of that term when speaking of grounds for divorce or separation. This state of things is anomalous, for before 1884 it was well settled that a respondent to a petition for restitution of conjugal rights was entitled to a separation if the petitioner failed to obtain relief. But this was because the only ground for failure was cruelty or adultery by the petitioner. Now there is another ground introduced by necessary implication from the language of the Act of 1884, and analogy to the principles on which the Ecclesiastical Courts acted, at first sight requires us to hold that as the peti-

tioner fails in her application the respondent ought to succeed in his. The language of the Act of 1884 does not, however, warrant the inference that such a consequence as this was intended, and to hold that a respondent to a petition for restitution of conjugal rights is entitled to a judicial separation whenever the petitioner is refused relief would be so seriously to enlarge the grounds for separation that we do not feel justified in going so far. We are satisfied that such a result as that was never intended by parliament. The Court is bound to see that the Act is not used for a purpose for which it was never intended; and this principle, although it introduces an anomaly, compels us to refuse relief both to the wife and to the husband, even at the risk of being thought somewhat illogical. The petition of the wife for restitution of conjugal rights and the counter-claim of the husband praying for a judicial separation must both be dismissed with costs, the costs of the one to be set off against the costs of the other in the Court below, and there will be no costs of appeal.

RIGBY L.J. The alleged cruelty in this case consists of charges of criminal offences of an infamous kind, persisted in after they had been found by the verdict of a jury to be untrue, and, as to the most important of them, brought forward and maintained under such circumstances as to preclude the belief that it was really thought by the wife to be true. No such case has ever before been brought before a Court. For myself I can imagine no case of repeated insult and indignity more atrocious, and the question is whether it constitutes a case of legal cruelty. The judgment of Sir William Scott in *Evans* v. *Evans* (1) is the leading authority on this subject. It has been quoted and relied upon from time to time: I may specially refer to *Westmeath* v. *Westmeath* (2) and *Paterson* v. *Paterson* (3); and, so far as I know, it has never been questioned as to any part of it. But it must be taken as a whole, and no one part can safely be left out of consideration. Sir William Scott begins by declining to define cruelty, and stating that it is the duty of the Courts to

(1) 1 Hagg. Cons. 35. (2) 2 Hagg. Ecc. Supp. 1, 56.
(3) 3 H. L. C. 308.

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keep the rule extremely strict; that the causes must be grave and weighty, and such as to shew an absolute impossibility that the duties of marriage life can be discharged; that in a state of personal danger no duties can be discharged, "but what falls short of this is with great caution to be admitted." It is important to notice that he does not say that personal danger is absolutely necessary, and that nothing short of it can be admitted, but only that what falls short is to be admitted with great caution. It is clear that he thinks that there may be cases where there is no personal danger, though such cases would be very exceptional. Lower down he says: "What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced." This involves that, in his opinion, there may be exceptional cases in which, without bodily injury or threat of it, the injury to the mental feelings may be legal cruelty. He does not, of course, attempt to indicate those cases, but I cannot doubt that he would have included a case like the present, since I am unable to imagine a case where the injury to the mental feelings could possibly be greater. Further on he refers to the case of wounding, not the natural feelings, but the acquired feelings arising from particular rank and situation, and states that, though the Courts will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. He made no such statement with reference to the wounding of ordinary mental feelings; and the difference of treatment of the two classes of cases is, in my judgment, significant and important. He then refers to the decided cases, saying: "In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. The doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reason-

able apprehension of bodily hurt." Now, as a description of the cases actually decided, this may be, and doubtless is, an accurate description. But it is certain that Sir William Scott did not intend to define legal cruelty: he expressly disclaims such an intention. If, indeed, there had been any decided case in which such charges as in the present case or verbal outrages of a similar nature had been considered before his time and treated as not constituting legal cruelty, the words used in this part of the judgment might be considered as a withdrawal of what he had before said. But no such case has been cited, and, indeed, since the time of Sir William Scott there have been, so far as I can find, only two cases in which verbal outrages of a nature at all comparable to those charged and proved in this case have been dealt with. I mean the case of *Bray* v. *Bray* (1), decided by Sir John Nicholl in 1828, and *Gale* v. *Gale* (2), in which verbal charges of incest were made by a husband against a wife. In the first case Sir John Nicholl says: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation (of incest) made by this husband against his wife." Here it is important to observe that the reference to great personal violence makes it impossible to contend that Sir John Nicholl was not using the word "cruelty" in the sense of legal cruelty. In the case of *Gale* v. *Gale* (2), which was, like *Bray* v. *Bray* (1), a case for divorce a mensâ et thoro brought by a wife against a husband, where a charge of incest with a stepfather was made by the husband, Sir John Dodson said that "the charge of having committed incest is not per se sufficient to constitute legal cruelty," unless coupled with substantial acts of violence. I am altogether unable to reconcile the case with that of *Bray* v. *Bray* (1); and, for myself, I consider the earlier case as being more in accordance with *Evans* v. *Evans* (3) than the later. Of course there are numerous cases, including some decided by Sir William Scott himself, in which a general rule appears to have been laid down involving the necessity of violence or injury to health reasonably to be apprehended as a minimum for the establishment of legal cruelty,

(1) 1 Hagg. Ecc. 163. (2) 2 Rob. Ecc. Rep. 421.
(3) 1 Hagg. Cons. 35.

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and there cannot be the slightest doubt that as a general rule covering the great—it may be the overwhelming—majority of cases this is so. It appears to me that the existence of this general rule, which is pointed out by Sir William Scott as a good general outline of the canon law, as distinguished from a definition, accounts sufficiently for all the decisions and judgments referred to which must be considered with reference to the nature of the cases before the Court. Nowhere do I find that a single judge has denied in direct language the possibility of extreme cases arising as pointed out in *Evans* v. *Evans*. (1) I do not think that it is necessary for me to mention more than two other cases. The first is that of *Paterson* v. *Paterson*. (2) This was a Scottish case; but although it was said that in some decided cases the Scottish Courts might have gone somewhat further than the English, the Courts of both countries apply the same principles of the canon law; and I see no reason to question the statement of Lord Brougham that the law of both countries, so far as it is material for the present purpose, is the same. Lord Brougham's own opinion is plainly shewn by his observations (at p. 328), where he says: "If the husband, without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless) . . . . if such a case were to be made out, or even short of such a case—namely, injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable—then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce a mensâ et thoro to a case such as I have put." But I wish particularly to call attention to the actual order of the House. The Lord Ordinary had dismissed the action "in respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer, unaccompanied with personal violence, or any menace thereof; and that, with-

(1) 1 Hagg. Cons. 35. (2) 3 H. L. C. 308.

out an allegation to that effect, it appears to be settled, on authorities which the Lord Ordinary is not entitled to question, that a libel at the instance of a wife against a husband, founded on such averments as those now urged, is not relevant." Lord Brougham says, with reference to this: "That, my Lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries; though I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our laws in favour of the remedy." The words quoted were ordered to be struck out of the finding of the Lord Ordinary, which was otherwise confirmed. They appear to me to raise the very question whether there may not be a series of insults and indignities, independently of violence or the menace thereof, capable in themselves of amounting to legal cruelty. The other case to which I wish to refer is that of *Milner* v. *Milner* (1), decided by Sir C. Cresswell in 1861. There, no doubt, there had been a technical assault, but not one of an aggravated nature such as to create pain or injury to health. The gravamen of the charge was the indignity to the wife of treating her publicly as a prostitute, and inducing others to consider her a prostitute, and it is this, to my mind, which Sir C. Cresswell characterizes as "gross and abominable cruelty." That a gross and abominable insult can only be called "cruelty" when it is accompanied by an assault not in itself sufficient to constitute legal cruelty, appears to me so revolting a conclusion that I am glad that I do not feel myself constrained by authority to support it. In words taken from the judgment of Sir W. Scott in *Evans* v. *Evans* (2), I say that the charges established are grave and weighty, and such as to shew an absolute impossibility that the duties of marriage life can be discharged. Disputes would inevitably arise between this ill-assorted pair, and I have no confidence or belief that, under provocation, a wife of the temper of the petitioner for restitution would not repeat, while I feel certain that the husband would be under the constant and reasonable apprehension of the repetition of, the infamous charges already made. I see no possibility under such circumstances of the duties of married

(1) 4 Sw. & Tr. 210. (2) 1 Hagg. Cons. 35.

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life being fulfilled. It is about as clear as anything future can be that this husband and wife will never live together, even though a decree for restitution were granted; but the only hypothesis on which such a decree can be granted is that they are to do so; and I see no possibility of that taking place with safety to either the one or the other. I go further, and say that to force the husband and wife into the intimacy of married life with such charges existing, and not unlikely to be repeated —for I give no weight to withdrawals by counsel at the crisis of a case—would raise a state of personal danger to one or other of the parties, it matters not which. I think that the jury had good ground for the conclusion at which they arrived, that there was cruelty on the part of the wife entitling the husband to a judicial separation.

On the application of the petitioner's counsel leave to appeal to the House of Lords was given in the event of such leave being required.

Appeal dismissed on petition for restitution of conjugal rights; allowed as to counter-claim for judicial separation.

Solicitors: *Valpy, Chaplin & Peckham; Vandercom, Hardy, Oatway & Doulton.*

M. W.

IN THE GOODS OF HONYWOOD.

1895
July 29.

Probate—Practice—Alteration in Grant—Omission of one of the Christian Names of an Executor.

The Christian names of an executor called in a will and grant of probate "Frederick" were "Frederick John."

The Court, on proof that the Bank of England had objected to transferring stock into the names of the executors, in consequence of this executor having signed the memorandum for the transfer with the initials "F. J.," allowed the description in the grant to be altered into "Frederick John M . . . ., called in the will Frederick M . . . ."

APPLICATION by the executors of the will of Frances Emma Honywood, that the grant of probate might be altered by changing the name of one of the executors called therein "Frederick Marsden" into "Frederick John Marsden."

The executor was called in the will Frederick Marsden. His name was Frederick John Marsden. The ground of the application was the refusal of the Bank of England to transfer certain stocks, which formed part of the estate, into the names of the executors, in consequence of the memorandum for the transfer having been signed by this executor "F. J. Marsden."

Barnard, in support of the application.

SIR F. JEUNE, PRESIDENT, directed that the description of the executor in the grant of probate should be altered into "Frederick John Marsden, called in the will Frederick Marsden."

Solicitors: *Forster, Frere & Co.*

H. D. W.

1895
Aug. 5.

IN THE GOODS OF SCOTT.

Probate—Practice—Administration Bond—Foreign Sureties.

Where the deceased, who was resident abroad, has left debts in England, an application for leave to give an administration bond with foreign sureties should be made to a Judge at Chambers.

The deceased died intestate, domiciled and resident in France. The English estate consisted of a share in a trust fund under the marriage settlement of his parents. The only debt in England was a sum due in respect of a mortgage of such share. The fund had become distributable, and the trustee was prepared, after paying the mortgage debt, to pay the balance to the personal representative. The widow of the deceased, who claimed to be entitled to administration according to French law, applied to be allowed to give a bond with French sureties, as she was unable to procure sureties in England.

Searle, in support of the application.

SIR F. JEUNE, PRESIDENT, granted the application, but stated that it should have been made to a Judge at Chambers, in accordance with the Directions of May 10, 1893. (1)

Solicitor: *Hilder.*

(1) Such Directions, which were given in lieu of those of November 15, 1892, were as follows:

"1. The administrator of a foreign subject resident abroad may (*a*) if it shall be proved by affidavit that the deceased left no debts in England, (*b*) by leave of a Judge at Chambers, be allowed to give a bond with foreign sureties.

"2. In all other cases sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, shall be required, except by leave of a Judge at Chambers."

See *In the Goods of De Beaufort*, [1893] P. 231.

H. D. W.

[DIVISIONAL COURT.]

1895
Aug. 6.

WOODHEAD *v.* WOODHEAD.

Husband and Wife—Aggravated Assault—Justices—Jurisdiction—Separation Order—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

A husband having been convicted of an aggravated assault upon his wife, a separation order, under s. 4 of the Matrimonial Causes Act, 1878, was made against him, such order not containing a provision for the wife's maintenance:—

Held, that there was no jurisdiction to make a subsequent order for the wife's maintenance.

APPEAL of Annie Woodhead from a decision of the recorder of Manchester, confirming the refusal of the stipendiary magistrate to make an order for the payment by John Woodhead, her husband, of a weekly sum for her maintenance pursuant to s. 4 of the Matrimonial Causes Act, 1878. (1)

(1) By the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, "If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide,

"(1.) That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the Court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made;

"(2.) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.

"Provided always, that no order for payment of money by the husband or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate

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The husband was convicted of an aggravated assault on the wife, and sentenced to a year's imprisonment in 1892. Upon the conviction the Court made under the section a separation order which gave the wife the custody of the children of the marriage, but did not provide for her maintenance. The application to the stipendiary magistrate was made in 1895 upon an affidavit by the wife that the husband had become possessed of a considerable sum of money, and was earning good wages.

Calvert, for the appellant. The appeal should be allowed. There was jurisdiction to make the order applied for. Under the Matrimonial Causes Act, 1857, an order for permanent alimony can be made after a decree absolute for dissolution: *Bradley* v. *Bradley*. (1)

Leonard, for the respondent. The appeal must be dismissed. The section does not provide for the making of an order for maintenance except as part of a separation order.

SIR F. JEUNE, PRESIDENT. This appeal must be dismissed. If the separation order made at the time of the conviction had contained a provision for the payment of a nominal sum for the maintenance of the wife, the magistrate might under the section have varied that order, on proof of an increase in the means of the husband. But the separation order said nothing as to maintenance, and the magistrate had clearly no jurisdiction to make an order for maintenance simply. The words of the section are "such order," that is, the separation order, "may provide that the husband shall pay to his wife" a weekly sum, "and the Court or magistrate by whom any such order for payment of money shall be made shall have power to vary the same." A provision for maintenance which is part of a separation order

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by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice."

By Order LIX., r. 4 A, "Appeals from orders under section four of the Matrimonial Causes Act, 1878, shall be heard by a Divisional Court of the Probate, Divorce and Admiralty Division."

(1) 3 P. D. 47.

may be varied, but the section does not give a magistrate power to make an order for maintenance alone.

It is unfortunate that this should be the effect of the language of the section; but it is repealed by the Summary Jurisdiction (Married Women) Act, 1895 (1), and I think that, when the provisions of the new Act are examined, it will be found that the difficulty has been noticed and provided against.

GORELL BARNES J. concurred.

Solicitors: *C. R. S. Hooper; Nowell, for Rideal, Manchester.*

(1) By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 12, s. 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), is repealed; and by s. 4, "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of 24 & 25 Vict. c. 100, s. 43 . . . . may apply . . . . for an order or orders under this Act . . . ."

Sect. 5: "The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

"(*a.*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

"(*b.*) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant:

"(*c.*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable:

"(*d.*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court, and such reasonable costs of either of the parties as the Court may think fit."

Sect. 7: "A court of summary jurisdiction . . . . may, on the application of the married woman or of her husband, and upon cause being shewn upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds."

H. D. W.

C. A. 1895 *Aug.* 8.

[IN THE COURT OF APPEAL.]

RICHARDSON *v.* RICHARDSON AND PLOWMAN.

Divorce—Practice—Costs—Pauper — Husband suing in Formâ Pauperis for Dissolution of Marriage—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.

A husband suing in formâ pauperis for dissolution of marriage having obtained a decree with costs against the co-respondent, it was held by Sir F. Jeune, President, following *Carson* v. *Pickersgill* (14 Q. B. D. 859), that the petitioner could only recover from the co-respondent his solicitor's expenses out of pocket, and a reasonable sum for office expenses:—

Held, by the Court of Appeal, that this decision ought not to be disturbed.

APPEAL by the petitioner from a decision of Sir F. Jeune, President (1), affirming a decision of the registrar with respect to the costs to be allowed as against the co-respondent.

Tebbutt, for the petitioner. The petitioner is entitled to full costs as against the co-respondent. None of the books on the old ecclesiastical practice suggest that when a pauper obtains a decree for costs they are to be taxed upon a different principle because he is a pauper: Conset Eccl. Pr. p. 56. If there had been any distinction of that kind there would have been some trace of it in the books of practice.

[LINDLEY L.J. Under the old law the only action against the co-respondent would have been a common law action, and a pauper plaintiff would only have been allowed pauper costs. Why should he get more because the Divorce Act makes the Divorce Court the sole tribunal? The old ecclesiastical practice cannot apply, for then the co-respondent was no party to the proceedings.]

Sect. 51 of the Divorce Act, 1857, gives a discretion to the judge, and it is submitted that he ought to have followed the analogy of the Chancery practice.

[LINDLEY L.J. Might not the President say that, in the exercise of his discretion, he would follow the common law rule? Have we any jurisdiction to hear an appeal from his discretion as to costs?]

(1) Ante, p. 276.

In *Robertson* v. *Robertson* (1) a similar appeal was entertained, and with the leave of the judge, which was given in the present case, an appeal for costs may be brought: *Smith* v. *Smith*. (2) This petition by the husband cannot be viewed in the same light as a common law action against the co-respondent, for he is a necessary party to the divorce proceedings whether damages are claimed against him or not. This is not a case of costs which are within the discretion of the judge. The judge may allow costs or not as he pleases; but how such costs are to be taxed is not a matter for his discretion. It will be urged that the registrar has followed the practice introduced by Sir James Hannen; but this practice has never found its way into any of the text-books. The observations of Lord Cottenham in *Rubery* v. *Morris* (3) are wholly in favour of the petitioner, and shew clearly what the Chancery practice was.

[LINDLEY L.J. Is not a party ordered to pay costs in order to indemnify the successful party against liability incurred? A pauper has incurred none, and if he received full costs he would make a profit.]

He would pay his solicitor with them. *Carson* v. *Pickersgill* (4) was decided under the Judicature Rules of 1883, and cannot be treated as an authority in a court to which those rules were never applied.

LINDLEY L.J. The question in this case is whether the President of the Divorce Division was wrong in adopting the rule in *Carson* v. *Pickersgill* (4), which now prevails in all the other Divisions and in the House of Lords. Looking at the matter on principle, I was much struck by the consideration that with a case in which a co-respondent is concerned the old practice of the Ecclesiastical Courts can have nothing to do, for no such thing as a co-respondent existed under that practice. By the Divorce Acts a co-respondent must be made a party to the petition for dissolution of marriage. When you look into the authorities as to suits for judicial separation, I doubt whether the practice as to these costs is so well settled as was contended for the

(1) 6 P. D. 119.
(2) W. N. (1882) 91.
(3) 1 Mac. & G. 413.
(4) 14 Q. B. D. 859.

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petitioner. The senior registrar, who knows more about these matters than any one living, is of opinion that there was no settled practice. The Divorce Act, 1857, gives the President discretion as to costs, and he, having considered the matter, thinks it the best exercise of his discretion, having regard to the modern practice, to follow the rule in *Carson* v. *Pickersgill* (1), except under special circumstances. We are asked now to say that a different rule should prevail. I am not prepared to say that. I think the old Chancery rule was wrong. I was brought up under it, but I think it proceeds on a wrong principle. The object of ordering a party to pay costs is to indemnify his successful opponent; and why should the successful party get more than he is liable to pay, and so make a profit? That consideration led to the abolition of the Chancery rule, and to the introduction of a new rule into all the Divisions of the High Court except the Probate Division. I am of opinion that the President was right and the appeal must be dismissed.

LOPES L.J. I also think that the decision of the President was right. It would be a great mistake to have one rule in the Divorce Court and a different rule in all the other Divisions. I look at the matter in this light. What is the object of giving costs? They are given to the successful party to indemnify him against the expenses to which he has been put by the unsuccessful party. A pauper litigant has not incurred any expense, so there is nothing against which to indemnify him. If you allow him "dives" costs he may put them into his pocket and make a profit out of the litigation, thus taking an undue advantage of the great indulgence granted him in allowing him to sue as a pauper. Stress has been laid on the practice of the old Ecclesiastical Court; but that Court could not decree a divorce a vinculo. This suit is quite a different thing from any suit which that Court could entertain; and I think that the analogy of the practice of the Common Law Courts is the one which ought to be adopted.

RIGBY L.J. If the old Ecclesiastical Courts had the rule which has been contended for, I do not see how it could bear on

(1) 14 Q. B. D. 859.

the liability of a co-respondent. Sir James Hannen laid down a rule and established a practice which seems not unreasonable. It has been adopted by the other branches of the High Court and by the House of Lords. We should be taking upon ourselves a great responsibility if we were to overrule the President on the ground that we are bound by an old practice the existence of which is not admitted.

Appeal dismissed.

Solicitors: *Bramwell, White & Sanders.*

H. C. J.

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July 30, 31; *Aug.* 10.

Admiralty—Insurance (Marine)—Live Cattle—All Risks, including Mortality from any cause whatsoever—Detention in Port of Refuge—Extra Fodder—Suing and Labouring Clause.

A marine policy of insurance on live cattle against all risks, including mortality from any cause whatsoever, renders the insurer liable, under the suing and labouring clause, for the extra cost of fodder supplied to the cattle whilst the vessel in which they are shipped is detained in a port of refuge for necessary repairs due to perils of the sea, for there is danger of total loss unless the expense is incurred.

HEARING, upon point of law, in an action under the suing and labouring clause in a policy of marine insurance to recover 54*l.* 12*s.* 1*d.*, the cost of extra fodder for cattle.

The plaintiffs were N. Lehman and Brothers, of New York; the defendants were the Sea Insurance Company, Limited, of Liverpool.

The facts, which were not in dispute, were shortly that—

On March 15, 1893, the steamship *Pomeranian* sailed from New York for Glasgow, carrying (inter alia) 125 head of cattle shipped by William W. Braner & Co., under the usual form of live stock bill of lading, pursuant to contract, and insured under a certificate of insurance (of which the plaintiffs were the holders) referring to a policy by which the defendants insured the cattle against all risks, including mortality from any cause whatsoever. The words of the clause are set out in the judgment.

On March 16 and 18 the vessel encountered heavy weather.

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On the latter day the low-pressure cylinder broke, owing to perils insured against, and the vessel, being unable to continue her voyage across the Atlantic in her disabled condition, bore up for and put into Halifax as a port of refuge, arriving there on March 23. She was necessarily detained there for repairs until April 9, when she proceeded on her voyage, and arrived at Glasgow on April 21.

None of the cattle were landed at Halifax, and it was admitted that they had neither sustained injury nor suffered from the delay. Sufficient fodder had been put on board before the vessel sailed from New York to feed the cattle, assuming the vessel made the passage without any unusual delay; but, in consequence of the extraordinary detention caused by the accident, it became necessary to purchase further fodder at Halifax. It was admitted that if the further fodder had not been supplied some of the cattle would have died; and it was contended on behalf of the plaintiffs that, the insurance being against mortality from any cause, the defendants were liable, under the suing and labouring clause in the policy, for the cost of the extra fodder supplied during the seventeen days' detention at Halifax, because it was an expense incurred to keep the cattle alive, and so avert a loss which would otherwise have fallen upon the defendants.

On behalf of the defendants, it was contended that no liability was cast upon them as the cattle were not in any peril at the time the expense for extra fodder was incurred, and it was an implied condition of the defendants' obligation that the plaintiffs, as cargo-owners and assured, should use reasonable diligence to keep the cattle in a fit condition throughout the voyage so that there was no suing and labouring extraordinary in kind to avert a loss, but only an expense incurred to enable the voyage to be completed.

On July 30, 31, the action was tried by Gorell Barnes J. on an agreed statement of facts, to which was annexed the certificate and policy of insurance, the bill of lading, and the contract.

Joseph Walton, Q.C., for the plaintiffs.
Carver, for the defendants.

[The arguments of counsel appear from the judgment. In addition to the cases therein mentioned, the following were referred to: *Kidston* v. *Empire Marine Insurance Co.* (1); *Everth* v. *Smith* (2); *Wilson* v. *Bank of Victoria* (3); *Lawrence* v. *Aberdein* (4); *Tatham* v. *Hodgson* (5); *Taylor* v. *Dunbar* (6); *Walker* v. *Maitland* (7); *Robinson* v. *Price* (8); Arnould on Marine Insurance, 6th ed. pp. 800, 881, and the cases there cited; Benecke on Marine Insurance, pp. 462–3.]

Cur. adv. vult.

Aug. 10. GORELL BARNES J. (after stating the nature of the case, the learned judge proceeded:—) The claim is based solely on the suing and labouring clause in the policy. The policy is on live cattle, and contains this clause, "Including all risk of shipping, and until safely landed. Against all risks, including mortality and jettison arising from any cause whatsoever. Animals walking ashore, or when slung from the vessel, walking after being taken out of the slings, to be deemed arrived, and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance." Further on in the policy there is the enumeration of the usual perils. Then, further on still, there is the suing and labouring clause and a warranty against average, unless general average, upon all articles that are perishable in their own nature, which it is said would apply to cattle.

The argument for the plaintiffs was that by the policy the defendants insured against mortality arising from any cause whatsoever, and that the expenses were incurred to avert a loss which would otherwise have fallen on the defendants. For the defendants it was urged that there was an implied obligation on the plaintiffs to provide the extra fodder at the port of refuge, and that the expenses were not incurred to prevent a loss for which the underwriters would otherwise be liable, as the cattle were, it is contended, in safety at Halifax. Counsel for

(1) L. R. 1 C. P. 535; 2 C. P. 357.
(2) 2 M. & S. 278.
(3) L. R. 2 Q. B. 203.
(4) 5 B. & Ald. 107.
(5) 6 T. R. 656.
(6) L. R. 4 C. P. 206.
(7) 5 B. & Ald. 171.
(8) 2 Q. B. D. 91.

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the defendants placed reliance on the case of the *Great Indian Peninsular Ry. Co.* v. *Saunders* (1) and on the case of *Booth* v. *Gair.* (2)

The policy by its special terms differs from an insurance under which the underwriter is not liable for delay, or any cause affecting the subject-matter of insurance. It was admitted that if there was a proper supply of food at the commencement of the voyage, and the vessel were delayed by bad weather so long that the food became exhausted, and the animals died from starvation, the underwriters would be liable. The policy is silent as to fodder at the commencement of the voyage. It is not necessary to decide what is to be implied as to the supply of fodder at the commencement of the voyage; but I think it is probably to be implied (at least) that the shippers are to send with the cattle a supply of fodder reasonably sufficient for a voyage of the duration to be expected; and that the underwriters would not be liable for mortality caused through the cattle being sent to sea with an insufficient supply of fodder for the voyage. I do not think, however, that there can be an implied obligation on the plaintiffs, as between them and their underwriters, to provide at the plaintiffs' expense an extra supply of fodder in the port of refuge, for, if so, in case of mortality resulting from default on the part of the plaintiffs' servants, and at the port of refuge, in neglecting to provide a proper supply of fodder, the plaintiffs could not recover the loss.

Again, if the animals had been necessarily landed during repairs, it is hardly contended that the underwriters would not be liable for the expense of hiring places to keep them in, and I do not understand why, if extra cost were incurred in feeding them on shore, to prevent mortality, the underwriters should not be liable for such extra cost. The shipowners were entitled to carry the cattle on; and if they did so, and no more food was supplied, it is obvious that there would be a risk of total loss from mortality. This condition of things would be brought about by perils enumerated in the policy; and in my opinion the expense incurred to prevent this loss comes within the suing and labouring clause.

(1) 1 B. & S. 41; 2 B. & S. 266. (2) 15 C. B. (N.S.) 291.

In the case of the *Great Indian Peninsular Ry. Co.* v. *Saunders* (1), where the insurance was free of particular average, the voyage was abandoned and the goods were sent back to the shippers, and there was no danger of total loss. I feel more difficulty in following the case of *Booth* v. *Gair* (2), where the insurance was upon bacon, and where the vessel in the course of her voyage encountered bad weather and put into Bermuda. She was there condemned and sold, and the master seems to have sent on the goods as agent for the cargo owners; but I understand that the Court thought there was, in fact, no danger of total loss. The cases which deal with the wages and provisions for crew and extra coals, &c., supplied in a port of refuge are based upon the principle that the extra expenses in respect of these matters are incurred by the shipowner in the performance of his contract of affreightment and cannot, therefore, fall on his underwriters.

The plaintiffs would, no doubt, take the precaution of providing fodder to prevent mortality to the cattle at the port of refuge; but there appears to have been no contract to supply more fodder, although the shipowners are entitled to carry the cattle on. There was under the circumstances danger of total loss unless the expense was incurred, and it seems reasonable to hold that for this extra expense the underwriters are liable.

My judgment will therefore be for the plaintiffs, for the agreed amount, 54*l.* 12*s.* 1*d.*, with costs.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

(1) 1 B. & S. 41; 2 B. & S. 266.

(2) 15 C. B. (N.S.) 291.

T. L. M.

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CHURCH—*Faculty—Erection in Parish Church of Rood Loft, Rood Beam, and Rood—Wooden Graven Figures on Rood Beam—Refusal of Confirmatory Faculty—Chancel Screen with Gates—Side Screens—Choir Stalls—Reasons for Caution in granting Confirmatory Faculties.*] The vicar and churchwardens of a parish church in the diocese of Norwich petitioned the Ordinary to authorize by faculty the retention in the church of the following works introduced into the church since its consecration and without the sanction of a faculty:—A chancel screen without gates, but surmounted by a loft resting on the top of the screen, four feet wide, and with sides three feet high, to which access was obtained by the old rood-loft stairs. A beam extending across the west end of the chancel at a height of four feet above the chancel screen, and placed upon such beam a figure of Our Lord upon the Cross, and on one side a figure of the Virgin Mary, and on the other side a figure of St. John; all such figures being graven in wood and of about life-size.—And the erection of the following new works:—The placing upon the above-mentioned beam of two other figures, one to represent Mary Magdalene, and the other a Centurion together with the figure of a Cherub at each end of the beam, the erection of gates to the chancel screen, of screens across the aisles, and of choir stalls with screens behind them.—It appeared that a dedication service had been held in the church on the occasion when the figures on the beam across the chancel had been put up, and that every year on Palm Sunday members of the church choir went into the loft above the chancel screen and sang there.—The Chancellor of the Diocese of Norwich refused to grant a faculty for the retention in the church of the loft over the chancel screen or of the figures placed on the beam above the same—in his opinion a rood loft and rood—or for the erection of the additional figures proposed to be placed thereon, holding that such loft and such figures so placed were unlawful within the ruling of Lord Penzance in *Clifton* v. *Ridsdale* (1 P. D. 316), and matters as to which in the discretion of the Court a faculty ought not to be granted, there being danger of "superstitious reverence" being paid to the rood. Further, the Chancellor decreed a faculty to issue for the chancel screen without the loft surmounting it; for the addition of gates to such screen, for the screens across the aisles with gates attached, and for the choir stalls and screens; evidence being before him that the expense of the works yet to be done would be met by voluntary subscriptions, and that the organ and other property in the chancel and aisles required protection. VICAR, &C., OF ST. JOHN THE BAPTIST, TIMBERHILL *v.* RECTORS, &C., OF SAME - 71

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2. —— *Faculty — Reredos — Triptych with Painted Panels surmounted by Figures of Our Lord and Moses and Elias.*] The Chancellor of the diocese of Manchester decreed a faculty to issue for the erection in a parish church of that diocese of an oaken reredos about eight feet in height, in the form a triptych with painted panels, of which panels the two side ones or wings, being hung to the centre panel by hinges, could be closed over it when divine service was not being performed; the centre panel to have painted thereon a representation of the Last Supper, and on the one wing to be represented in painting "The Agony in the Garden," and on the other "The Risen Christ with the Marys at the Tomb": the reverse sides of the wings to be plain; the whole to be surmounted by a figure of Our Lord carved in plain oak eighteen inches high, between figures of Moses and Elias of the same height

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beneath pillared canopies connected by an arch of tracery work over the central figure, and flanked by angels. The faculty so decreed to be issued was required to contain a proviso that the triptych was always to remain open during the performance of divine service. VICAR, &c., OF ST. JOHN, PENDLEBURY *v.* PARISHIONERS OF SAME [178

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3. —— *Administration with the Will annexed—Legacy to a Roman Catholic Convent.*] A testatrix bequeathed the residue of her property to A. B. "to be disposed of as she shall think fit at her discretion for the benefit of" a Roman Catholic convent. The executor of the will and A. B. having died during the lifetime of the testatrix, the Court made a grant of administration with the will annexed to the Reverend Mother of the convent as residuary legatee, on proof of the permanence of the institution, and of the fitness of the Reverend Mother, having regard to her powers, to receive and apply the legacy.—*Walsh* v. *Gladstone* (1 Ph. 290) followed. IN THE GOODS OF M'AULIFFE - - 290

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PRACTICE—*Administration Bond—Foreign Sureties.*] Where the deceased, who was resident abroad, has left debts in England, an application for leave to give an administration bond with foreign sureties should be made to a judge at chambers. IN THE GOODS OF SCOTT - 342

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3. —— *Res inter alios acta—Validity of Will—Cognizance of the Proceedings and Power to Intervene.*] A person who is not a party to proceedings in the Probate Division in which the validity of a will is questioned is bound by the result only if he was cognizant of the proceedings, and had a right to intervene.—An action was brought for the revocation of the probate of a will which the Court in a previous action had held to be valid. The plaintiff was cognizant of, and had assisted the plaintiff in, the previous action; but, according to his affidavit, he had not then, so far as he knew, any interest in the suit, and could not, therefore, have intervened. His case was that the will which had been declared valid was a forgery, and that he was a legatee under an earlier will which there had been a conspiracy to suppress, but that these facts had only come to his knowledge since the previous action. It appeared that the earlier will was not likely to be produced at the trial:—*Held*, that the plaintiff was not bound by the result of the previous action, and that the action brought by him ought not to be dismissed as frivolous. YOUNG *v.* HOLLOWAY - - - - 87

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See ADMINISTRATION.

WILL—*Codicil—Document not referred to as existing.*] A testator devised property to trustees in trust to provide an annuity of 3000*l.* for his wife, setting apart certain funds which they would find "noted" by him. He made two codicils confirming the will. After his death a document was found in his handwriting purporting to be instructions to his executors, and containing the words, "The stocks to be set aside to pay my wife the 3000*l.* per annum," followed by a list of securities, the total income from which was stated at 3000*l.* The earliest date which could be attributed to this document was after the will, but before the codicils.—*Held*, that as the language of the will did not refer to the document as existing, the codicils had not the effect of incorporating it with the documents of which probate was to be granted.—*In the Goods of Mary Reid* (38 L. J. (P. & M.) 1) followed. DURHAM *v.* NORTHEN - - - - 66

2. —— *Codicils—Implied Revocation—Substituted or Cumulative Legacies.*] By a first codicil to his will a testator made a provision for his wife, gave directions as to his burial and monument, and bequeathed pecuniary and specific legacies. On the death of his wife, the testator altered a draft of the first codicil so as to make a second. The second codicil referred to the will but not to the first codicil, and, except that it contained dispositions consequent upon the death, and that one legacy was increased after it had been engrossed, was a repetition of the first codicil. There was no external evidence of the testator's intention as to the two codicils:—*Held*, that the second codicil was intended to be substituted for the first codicil, and could alone be admitted to probate with the will. CHICHESTER *v.* QUATREFAGES - - - - 186

3. —— *Practice—Position of Signature of Testator—"At the foot or end thereof"—"Opposite to the end of the Will"—Wills Act Amendment Act*, 1852 (15 & 16 *Vict. c.* 24), s. 1.] A testamentary document consisted of a sheet of

WILL—*continued.*
paper containing on the first page a lithographed form of will. The form in the first page was filled in by the testatrix, and contained bequests to my "sisters and friends." Her signature and those of the attesting witnesses were at the bottom of the first page. The second and third pages contained a list of bequests to persons, some of whom were the sisters and others friends of the testatrix. There was no direct evidence that the second and third pages had been written before the execution of the will:—*Held*, that, assuming the second and third pages to have been written before the execution of the will, the signature of the testatrix was not so placed "opposite to" the writing contained in these pages as to bring the case within s. 1 of the Wills Act Amendment Act, 1852, and that, therefore, the first page alone could be admitted to probate. —*In the Goods of Wotton* (L. R. 3 P. & D. 159) explained. ROYLE *v.* HARRIS - - 163

—— Validity—Res inter alios acta—Validity of will—Cognizance of the proceedings and power to intervene - - 87
See PRACTICE. 3.

WORDS:—"At the foot or end thereof" - 163
See WILL. 3.

—— "Opposite to the end of the will" - 163
See WILL. 3.

DIVORCE.

CASES:—*Carson* v. *Pickersgill & Sons* (14 Q. B. D. 859) followed - - 276, 346
See PRACTICE. 1, 2.

—— *G.* v. *M.* (10 App. Cas. 171) followed 274
See NULLITY OF MARRIAGE.

—— *Powell* v. *Powell* (14 P. D. 177) overruled
See SEPARATION ORDER. [201

—— *Tress* v. *Tress* (12 P. D. 128) followed 220
See PRACTICE. 4.

COLLUSION — *Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 30—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *ss.* 5, 7.] If the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld.—The petitioner made an agreement with the respondent, who had committed adultery with the co-respondent, by which she undertook to settle money on the child of the marriage, and he to take proceedings for divorce, which she was not to defend and of which she was to pay the costs, he not claiming damages against the co-respondent. The agreement was disclosed to the Court. The petitioner did not connive at the adultery, and no false testimony was adduced before the Court in proof of it. It was not shewn that there were any specific facts, material to defence or recrimination, which might have been brought forward by the respondent; but it was not proved that there were no material facts which she might have brought forward by way of defence or recrimination:—*Held*, on the intervention of the Queen's Proctor, that the agreement constituted collusion between the petitioner and the respondent, so as to disentitle the petitioner to a divorce. CHURCHWARD *v.* CHURCHWARD - - - - - - - 7

COSTS—Divorce—Pauper—Solicitor—Husband suing in formâ pauperis for dissolution of marriage - - - 276
See PRACTICE.

—— Husband suing in formâ pauperis for dissolution of marriage—Practice - 346
See PRACTICE. 2.

CRUELTY—Restitution of conjugal rights—Judicial separation - - 315
See RESTITUTION OF CONJUGAL RIGHTS.

DELAY — Divorce — Husband's petition—Unreasonable delay in presenting petition
See PRACTICE. 3, 4. [288, 220

—— Nullity of marriage—Sincerity - 274
See NULLITY OF MARRIAGE.

EVIDENCE—Separation order—Justices—Right of husband to give evidence - 201
See SEPARATION ORDER.

HUSBAND AND WIFE—Aggravated assault—Separation order—Justices—Jurisdiction - - - - - 343
See SEPARATION ORDER. 2.

—— Paraphernalia - - - - 1
See PARAPHERNALIA.

—— Separation order—Justices—Aggravated assault—Right of husband to give evidence - - - - 201
See SEPARATION ORDER.

—— Restitution of conjugal rights—Cruelty—Judicial separation - - 315
See RESTITUTION OF CONJUGAL RIGHTS.

IMPOTENCE—Nullity of marriage—Delay—Sincerity - - - - 274
See NULLITY OF MARRIAGE.

JUDICIAL SEPARATION—Cruelty—Restitution of conjugal rights - - - 315
See RESTITUTION OF CONJUGAL RIGHTS.

JUSTICES—Separation order—Practice - 201
See SEPARATION ORDER.

MARRIED WOMAN—Paraphernalia - 1
See PARAPHERNALIA.

MISCONDUCT OF PETITIONER — Collusion—Agreement between petitioner and respondent as to proceedings for divorce
See COLLUSION. [7

NULLITY OF MARRIAGE—*Wife's Petition—Impotence—Delay—Sincerity.*] A wife, seven years after her marriage, took proceedings for nullity on the ground that (as the fact was) the marriage had not been consummated owing to the impotence of her husband. It appeared that the impossibility of sexual intercourse had caused unhappy relations between the petitioner and the respondent, in consequence of which they had separated, but that since the filing of the petition she had offered to return to him:—*Held*, that the conduct of the petitioner had not been such as to constitute an estoppel within the meaning of the dictum of Lord Selborne in *G.* v. *M.* (10 App. Cas. 171, at p. 186) as to want of sincerity, and that she was entitled to a decree of nullity. L. OTHERWISE B. *v.* B. - - - - - **274**

PARAPHERNALIA — *Husband and Wife — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2, 17.] The Married Women's Property Act, 1882, has not abolished the general law as to gifts of paraphernalia.—A husband, who married after the passing of the Married Women's Property Act, 1882, made his wife valuable presents of jewellery. He stated that he only allowed her the use of them, she that he gave them to her absolutely; and her evidence was considered more to be relied on than his. It also appeared that he made the presents in the same manner and with the same words that he had used in making her presents before marriage, and never gave her to understand that the jewels were only lent to her, till he took proceedings for a divorce. Most of the presents were made on Christmas days or her birthdays, or as "peace-offerings" after disputes; and she, to his knowledge, kept the jewels in her possession or at a bank in cases stamped with her initials:—*Held*, that the question whether a gift to a married woman constitutes paraphernalia was to be determined on the same principle as before the Act, and that the proper inference from the facts above stated was that the jewels were not paraphernalia, but the separate property of the wife. TASKER *v.* TASKER - - - - **1**

PAUPER—Divorce—Practice—Costs—Husband suing in formâ pauperis for dissolution of marriage - - - **276, 346**
See PRACTICE. 1, 2.

PRACTICE—*Costs—Pauper—Solicitor—Husband suing in Formâ Pauperis for Dissolution of Marriage—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.] Subject to the discretion of the Court under s. 51 of the Divorce Act, 1857, it is the practice in the Probate Division to allow a husband suing in formâ pauperis for dissolution of marriage only his or his solicitor's costs out of pocket, including those of the certificate, and in the latter case a reasonable sum for office expenses, against the co-respondent.—*Carson* v. *Pickersgill & Sons* (14 Q. B. D. 859) followed.—*Semble*, per Sir F. Jeune, President, that a barrister or a solicitor may receive fees from such pauper petitioner, and that a solicitor not assigned by the Court, but employed by such pauper petitioner, can sue his client on a retainer: also

PRACTICE—*continued.*
that the respondent and co-respondent may, if successful, obtain an order for full costs against such pauper petitioner: also that there is no clear rule of practice as to whether the respondent should obtain an order for security for costs against such pauper petitioner, but each case must be dealt with on its own merits. RICHARDSON *v.* RICHARDSON - - - - **276**

2. —— *Costs — Pauper — Husband suing in Formâ Pauperis for Dissolution of Marriage—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.] A husband suing in formâ pauperis for dissolution of marriage having obtained a decree with costs against the co-respondent, it was held by Sir F. Jeune, President, following *Carson* v. *Pickersgill* (14 Q. B. D. 859), that the petitioner could only recover from the co-respondent his solicitor's expenses out of pocket, and a reasonable sum for office expenses:—*Held*, by the Court of Appeal, that this decision ought not to be disturbed. RICHARDSON *v.* RICHARDSON **C. A. 346**

3. —— *Dissolution of Marriage—Husband's Petition—Unreasonable Delay in presenting Petition—Questions for the Jury—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.] In a case in which the Queen's Proctor intervened to prevent a decree nisi obtained by a husband for the dissolution of his marriage being made absolute on the ground of unreasonable delay in presenting the petition, the proper questions for the jury were held to be, When did the petitioner first know or have reason to believe that the respondent had committed adultery? and when did the petitioner first take action in order to obtain a divorce? BROUGHAM *v.* BROUGHAM - **288**

4. —— *Husband's Adultery and Desertion—Separation Deed—Unreasonable Delay in presenting Petition — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.] By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband, who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights, has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion."—In a petition by a wife for the dissolution of her marriage, it appeared that her husband and she were married in 1858, but had lived voluntarily apart under a separation deed since 1870. In 1890 she had petitioned for a divorce on the ground of adultery coupled with cruelty, but her petition had been dismissed on the ground of unreasonable delay. She afterwards wrote to her husband proposing

PRACTICE—*continued.*
that they should live together, and, upon his refusal, sued in 1894 for restitution of conjugal rights. Her husband did not plead the deed of separation, and she obtained a decree. Her husband did not comply with the decree, and had been guilty of adultery. The wife now claimed a divorce on the ground of adultery coupled with desertion under the above section. It would have been impossible for her to prove a desertion before the refusal of her husband to resume cohabitation:—*Held*, that, as there was nothing to shew when the husband became unable or unwilling to use the deed of separation as an answer to the suit for restitution of conjugal rights, it was impossible to say that such suit was practicable before it was in fact instituted, and that the Court was therefore justified in holding that there had been no unreasonable delay, and in granting a decree nisi for the dissolution of the marriage.—*Tress* v. *Tress* (12 P. D. 128) followed. —*Semble*, per Sir F. Jeune, President, that, where a petitioner, having a complete case for dissolution of marriage on the grounds of adultery and desertion, is guilty of unreasonable delay in bringing it forward, she does not avoid the consequence of that delay by obtaining a decree for restitution of conjugal rights, and that when there has been unreasonable delay in applying for restitution of conjugal rights, such delay, though it be no ground for refusing the application, may be ground for the Court exercising its discretion on the subsequent petition for dissolution. BEAUCLERK *v.* BEAUCLERK - - 220

—— Justices — Aggravated assault — Right of husband to give evidence - - 201
See SEPARATION ORDER.

—— Nullity of marriage—Delay—Sincerity 274
See NULLITY OF MARRIAGE.

—— Settlement, variation of - - 92
See SETTLEMENTS, VARIATION OF.

RESTITUTION OF CONJUGAL RIGHTS—*Cruelty —Judicial Separation—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22—*Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5.] A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although persisted in, is not sufficient evidence of legal cruelty to support a petition by the husband for judicial separation. So *held* by the majority of the Court of Appeal (Lindley and Lopes L.JJ., Rigby L.J. dissenting).—But *held*, by the Court of Appeal, that such conduct on the part of the wife justified the Court in refusing to accede to her petition for restitution of conjugal rights.—The effect of the 5th section of the Matrimonial Causes Act, 1884, which enacts that a respondent who fails to comply with a decree for restitution of conjugal rights shall be deemed guilty of desertion without reasonable cause, and that a suit for judicial separation may be forthwith instituted, is to give the Court power to refuse a decree for restitution whenever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case. RUSSELL *v.* RUSSELL [C. A. 315

SEPARATION DEED — Petition for divorce — Husband's adultery and desertion—Unreasonable delay in presenting petition
See PRACTICE. 4. [220

SEPARATION ORDER—*Husband and Wife—Aggravated Assault—Justices—Right of Husband to give Evidence*—24 *&* 25 *Vict. c.* 100, *s.* 43—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4.] A husband who has been convicted by justices of an aggravated assault upon his wife is entitled to give evidence on an application by her for a separation order under s. 4 of the Matrimonial Causes Act, 1878.—*Powell* v. *Powell* (14 P. D. 177) overruled. JONES *v.* JONES 201

2. —— *Husband and Wife—Aggravated Assault—Justices—Jurisdiction—Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4—*Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39).] A husband having been convicted of an aggravated assault upon his wife, a separation order, under s. 4 of the Matrimonial Causes Act, 1878, was made against him, such order not containing a provision for the wife's maintenance: —*Held*, that there was no jurisdiction to make a subsequent order for the wife's maintenance. WOODHEAD *v.* WOODHEAD - - - 343

SETTLEMENTS, VARIATION OF—*Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.] By a settlement on his marriage with the respondent, the petitioner settled certain property on himself for life, with remainder to the sons of his marriage with the respondent, with remainder to the sons of any subsequent marriage, with remainder to a brother of the petitioner and the sons of that brother, with remainder to the daughters of the petitioner and the respondent, and with ultimate remainder to himself. The marriage, of which there was no issue, had been dissolved on the ground of the misconduct of the respondent, and the brother of the petitioner had died unmarried: —*Held*, that, under s. 5 of the Matrimonial Causes Act, 1859, an order might be made for the reconveyance of the property to the petitioner for his own use. MEREDYTH *v.* MEREDYTH 92

SOLICITOR—Costs—Divorce—Pauper—Solicitor —Husband suing in formâ pauperis for dissolution of marriage - - 276, 346
See PRACTICE. 1, 2.

STATUTES:—
20 & 21 Vict. c. 85, s. 22 - - - 315
See RESTITUTION OF CONJUGAL RIGHTS.
—— —— s. 30 - - - - - 7
See COLLUSION.
—— —— s. 31 - - - 220, 288
See PRACTICE. 4, 3.
—— —— s. 51 - - - 276, 346
See PRACTICE. 1, 2.
22 & 23 Vict. c. 61, s. 5 - - - 92
See SETTLEMENTS, VARIATION OF.

STATUTES—*continued.*
23 & 24 Vict. c. 144, ss. 5, 7 - - 7
See COLLUSION.
24 & 25 Vict. c. 100, s. 43 - - - 201
See SEPARATION ORDER.
41 & 42 Vict. c. 19, s. 4 - - - 201
See SEPARATION ORDER.
—— —— —— - - - - 343
See SEPARATION ORDER. 2.

STATUTES—*continued.*
45 & 46 Vict. c. 75, ss. 1, 2, 17 - - 1
See PARAPHERNALIA.
47 & 48 Vict. c. 68, s. 5 - - - 220
See PRACTICE. 4.
—— —— —— - - - - 315
See RESTITUTION OF CONJUGAL RIGHTS.
58 & 59 Vict. c. 39 - - - - 343
See SEPARATION ORDER. 2.

ADMIRALTY.

ABANDONMENT—Insurance (marine)—Cash advances for ship's disbursements—Prepaid freight—Rights of underwriters on ship
See INSURANCE (MARINE). [293

APPEAL—Court of Appeal—Salvage—Amount of award reduced — Apportionment — Costs - - - - 176
See PRACTICE. 6.

APPRAISEMENT—Salvage—Affidavit of value —Appraisement—Evidence of value—Tender - - - - 33
See PRACTICE. 5.

ARREST—Foreign ship — Jurisdiction—Action in rem—Writ served but warrant not served—Judgment by default - 121
See PRACTICE. 4.

CASES—*Agricola, The* (2 Wm. Rob. 10) followed
See COLLISION. [170

—— *Courtney* v. *Cole* (19 Q. B. D. 447) distinguished - - - - 170
See COLLISION.

—— *Eden, The* ([1892] P. 67) approved - 40
See PRACTICE.

—— *India, The* (32 L. J. (Ad.) 185) overruled
See NECESSARIES. [95

—— *Jacob Landstrom, The* (4 P. D. 191, 193) dissented from - - - 264
See PRACTICE. 7.

—— *Lloyds or Sea Queen, The* (Br. & L. 359) followed - - - - 170
See COLLISION.

—— *Merryweather* v. *Nixan* (8 T. R. 186) followed - - - - 212
See PRACTICE. 2.

—— *Umbilo, The* ([1891] P. 118) distinguished
See LIMITATION OF LIABILITY. [117

CHARTERPARTY—Demurrage — Running days —Lay-days - - - - 56
See DEMURRAGE.

COLLISION — *Compulsory Pilotage — Coasting Trade—Foreign-going Ship—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 376, 379—*Order in Council, Dec.* 21, 1871—*Customs Consolidation Act*, 1876 (39 & 40 *Vict. c.* 36), *ss.* 129, 144, 145—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict. c.* 21), *s.* 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 625.] The defendants' steamship made regular voyages from London with part of her cargo and ballast to Cardiff, or other port in the Bristol Channel, where she discharged her ballast, took in the remainder of her cargo, and proceeded to Venice, or other Mediterranean ports, and returned to London. On the voyage in question she was proceeding down the Thames, within the London district, in charge of a Trinity House pilot, when she came into collision with the plaintiffs' barge in tow of a tug, and both vessels were held to blame; but the fault, so far as the steamship was concerned, was that of the pilot alone:—*Held*, by Bruce J., that the defendants were not liable, as, following *The Agricola* (2 Wm. Rob. 10), and *The Lloyds or Sea Queen* (Br. & L. 359), the steamship was a foreign-going ship, not within any of the exemptions in the Merchant Shipping Act, 1854, and, therefore, the employment of the pilot was compulsory. *Courtney* v. *Cole* (19 Q. B. D. 447) distinguished. THE WINESTEAD - - 170

2. —— *Damages—Contract overriding Limitation of Liability — Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.] The defendant entered his yacht for a race on the condition that "while sailing under the entry" he would obey and be bound by certain rules. By one of the rules the owner of any yacht, disobeying or infringing any of them, was liable for "all damages arising therefrom." Whilst sailing under these rules, and in breach of one of them, the defendant's yacht, through improper navigation without the actual fault or privity of the defendant, ran into and sank another yacht. The plaintiffs, the owner, master, and crew of the yacht which had been sunk, sued the defendant for the damage sustained by the collision. The defendant counter-claimed for a stay of proceedings on payment into Court of a sum equal to 8*l.* per ton of the registered tonnage of his yacht with interest, as being the amount for which he was answerable under s. 54 of the Merchant Shipping Act Amendment Act, 1862:—*Held*, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), that, at the material time, a contract existed between the owners of the competing yachts by which the defendant became liable for all damages arising from the infringement of the rule, and therefore (reversing the decision of Bruce J.) the defendant could not, as against the plaintiff, the owner of the yacht sunk, set up the statutory limitation of liability. THE SATANITA - - - - C. A. 248

COLLISION—*continued.*

3. —— *Duty of Steam Vessel anchoring in Thames—Thames Bye-laws*, 1887, *art.* 18, *and* 1892, *art.* 7 (*c*).] The master of the plaintiffs' steamship proceeding, about 7 P.M. in the month of November, up Barking Reach in the River Thames, with a flood-tide of about half a knot, decided to anchor on account of fog. He stopped his engines, put his helm hard-a-port, and, having given the vessel an angle across the river to the northward, set his engines slow ahead, and then full speed astern. When the way was taken off his ship he let go the anchor, and, on a hail from the mate that the anchor was holding, ordered the two side lights and the mast-head light to be taken in, and the riding light to be put up, leaving a stern light, shewing twenty points, still exhibited. The fog during this time had lifted, and the defendants' steamship, coming down the river, seeing the mast-head and red light of the plaintiffs' ship a little on the port bow, ported. The red light then disappeared, and the plaintiffs' steamship was seen to be lying across the river, whereupon the engines of the defendants' ship were reversed full speed, but a collision occurred: —*Held*, by Bruce J., that the plaintiffs' steamship was alone to blame, as, when throwing herself athwart the navigable channel, and stopping her way, she was within art. 18 of the Thames Bye-laws, 1887, and was bound to give four or more blasts of the steam whistle in rapid succession, so long as the danger lasted—that is, until she had swung to her anchor. The side lights ought also to have been taken in as soon as the vessel was held by her anchor, and, being over 150 feet in length, the second riding light prescribed by art. 7 (*c*) of the Thames Bye-laws, 1892, should have been duly exhibited at or near the stern. THE WEGA - - - 156

4. —— *Fog—"Fairway" of River—Duty to ring Bell when at Anchor — Bye-laws for Navigation of Thames*, 1880, *art.* 13.] By art. 13 of the Bye-laws of the Navigation of the Thames, 1880, a vessel in fog, "when in the fairway of the river, and not under way, shall, at intervals of not more than two minutes, ring the bell."—The plaintiff's sailing barge, having anchored, on account of fog, above and inside the West Blyth buoy in Sea Reach, did not ring her bell at the above intervals. She was run into and damaged by the defendants' steamer, which, in the Court below, was found alone to blame for negligent navigation in fog:—*Held* by the Divisional Court (Sir F. H. Jeune, President, and Bruce J.), that the barge was also to blame, as she was within art. 13, and bound to ring her bell; for the word "fairway" means "a clear passage-way by water," and the barge was anchored in a part of the river where it is safe for vessels of moderate draught to navigate. THE BLUE BELL - 242

5. —— *Lights — Steamer riding by her Chains with Anchors Unshackled.*] A steamship, when near the Goodwin Sands in the English Channel, finding herself unable to make headway against a S.W. gale, unshackled her anchors, banked her fires, shut off steam, and rode, head to wind, by her chains. At sunset she took down the three black balls she had hoisted, and exhibited an anchor light forward, and a globular white light aft.—A sailing vessel also proceeding down channel, and heading about S.S.E., close hauled on the starboard tack, mistook the lights for the masthead and green of a steamer in motion, and, expecting the steamer to give way, kept on her course. A collision occurred:—*Held*, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), affirming the decision of the President (Sir F. H. Jeune), that the steamer was alone to blame, as the lights she exhibited were calculated to mislead, so that the mistake on the part of the sailing vessel was excusable. The steamer, having rendered herself unmanageable, should have exhibited three red lights, and should have kept steam readily available so as to bring herself promptly under command in case required. THE FAEDRELANDET - - - C. A. 205

COLLISION—*continued.*

—— County Court—Practice — Trial by judge with assessors—Jury - - 142
See COUNTY COURT.

—— Damages—Decree that a tug and her tow are to blame—Joint tortfeasors—Assignment of judgment - - - 212
See PRACTICE. 2.

—— Practice—Third party—Indemnity 281
See PRACTICE. 3.

CO-OWNERSHIP—*Sale of ship against will of Majority—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 8.] The majority of the co-owners of a ship formed a limited company to which they transferred their shares. The minority of the co-owners moved, in an action of restraint, for the sale of the ship:—*Held*, by Bruce J., that the majority of the co-owners had no right to change the character of the ownership without the consent of all parties, and therefore, in the exercise of the discretion of the Court under s. 8 of the Admiralty Court Act, 1861, and in the interests of all concerned, the sale of the whole ship would be decreed. THE HEREWARD - - 284

COSTS—Admiralty—Salvage—Refusal to consolidate action - - - - 193
See SALVAGE.

—— Salvage—Practice of Court of Appeal — Amount of award reduced—Apportionment—Costs - - - 176
See PRACTICE. 6.

COSTS, SECURITY FOR—County court—Appeal from county court to High Court—Security for costs—Decree for amount not exceeding 50*l.*—Point of law—Construction of statute - - 40
See PRACTICE.

COUNTY COURT—*Practice—Collision—Trial by Judge with Assessors and /or Jury—County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 10, 11—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 101.] The plaintiffs, owners of a flat, instituted an action in personam, in the sum of 275*l.*, under the Admiralty jurisdiction of a county court, against the defendants, the owners of a steamer, for damages for injuries to their flat by collision with the defendants' steamer, and on the demand of the plaintiffs, under s. 101 of the

COUNTY COURT—*continued.*

County Courts Act, 1888, the registrar gave the defendants notice that the action would be tried by a jury. The defendants filed a request, under s. 10 of the County Courts Admiralty Jurisdiction Act, 1868, that two nautical assessors be summoned to assist the judge at the hearing of the action, and, on an application to the judge for directions as to the mode of trial, the county court judge held that, if a jury were asked for, he was obliged to allow the case to be so tried. On appeal by the defendants:—*Held*, by the Divisional Court (Sir F. H. Jeune, President, and Bruce J.), reversing the decision of the county court judge, that the exception in s. 10 of the Act of 1868 as to the trial of Admiralty causes of salvage, towage, and collision limited the general provisions of s. 101 of the Act of 1888, so that in an Admiralty cause of collision, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors. THE TYNWALD [142

2. —— *Salvage — Jurisdiction — Gas Float — County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 458, 476.] The plaintiffs obtained a salvage award in a county court, having Admiralty jurisdiction, for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat-shaped, and contained gas, which by its own elasticity supplied, day and night for about six weeks, the light raised above it.—On appeal by the defendants, the owners of the gas float, on the ground that, by reason of the subject-matter and locality, there was no jurisdiction:—*Held*, by the Divisional Court (Sir F. H. Jeune, President, and Bruce J.), that, though the gas float was not a "ship" or "wreck" within the meaning of ss. 2 and 458 of the Merchant Shipping Act, 1854, so as to be a subject of salvage under the latter section, there was Admiralty jurisdiction under s. 476 of that Act (extended to county courts by s. 3 of the County Courts Admiralty Jurisdiction Act, 1868), as such a structure, used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea, would have been within the jurisdiction of the Admiralty, if adrift upon the high seas, and was, therefore, by virtue of that section, also within the jurisdiction of the Admiralty when in the body of a county.—*Semble.* It is an essential part of the idea of a "ship" that she should be used or intended to be used in navigation, that is, in the transport by water of persons or things. The word "wreck" means something which formed part of a ship, including her apparel or her cargo. THE GAS FLOAT WHITTON NO. 2 - - - - 301

—— Admiralty—Appeal from county court to High Court—Security for costs—Decree for amount not exceeding 50*l.*—Point of law - - - - - 40
See PRACTICE.

DAMAGES—Collision—Contract overriding limitation of liability - - - 248
See COLLISION. 2.

DEMURRAGE—*Charterparty—Running Days—Lay-days.*] By a charterparty, fourteen running days (Sundays and holidays excepted) were to be allowed for loading and unloading, and ten days on demurrage over and above the said lay-days at fourpence per ton on the steamer's gross register tonnage per running day. Seven of the lay-days were consumed at the port of loading, and the vessel arrived at the port of discharge on a Saturday, but was not cleared till 10 A.M., when the master gave notice to the defendants, the consignees of the cargo, that the vessel was ready to discharge. The defendants declined to receive the cargo on that day, but ultimately agreed, and the discharge took place on the Saturday for three hours, viz., from 1 P.M. to 4 P.M., and the unloading was finally completed by 9 A.M. on the Monday week:—*Held*, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), reversing the decision of the President, that though the defendants were entitled to a whole lay-day, and were therefore not bound to take delivery on the Saturday, they, by agreeing to commence the discharge on that day, impliedly agreed to count that day as a lay-day. Therefore, the seven lay-days (excluding Sunday) expired on the following Saturday, and the defendants were liable to the plaintiff, the shipowner, for two days' demurrage:—*Held also*, affirming the decision of the President, that running days meant calendar days from midnight to midnight, and not periods of twenty-four hours. THE KATY - - C. A. 56

DISBURSEMENTS — *Maritime Lien—Liabilities incurred by Master—Bill of Exchange—Priorities — Mortgagees — Merchant Shipping Act*, 1889 (52 *&* 53 *Vict. c.* 46), s. 1.] The defendants, shipowners in London, contracted with a coal merchant for the supply of bunker coal to their vessel then lying in the port of London, and about to sail on a voyage to the Mediterranean. As part of the contract payment was to be made by bill of exchange drawn by the master on the defendants in favour of the coal merchants. The bill so drawn by the master was accepted by the defendants but dishonoured at maturity; and the plaintiff, the master of the vessel, thereupon issued a writ in rem, arrested the ship, and claimed the amount of the bill, notarial charges, and the costs of an action against him as drawer. The defendants did not appear; but on the intervention of prior mortgagees of the vessel:—*Held*, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), affirming the decision of the President ([1894] P. 271), that the liability of the plaintiff as drawer of the bill of exchange was not a liability "properly incurred by him (as master) on account of the ship" within the meaning of s. 1 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), and, therefore, no lien had been created in his favour to the prejudice of the mortgagees.—The terms "disbursements" and "necessaries" considered. THE ORIENTA [C. A. 49

—— Insurance (marine)—Abandonment—Cash advances for ship's disbursements — Prepaid freight—Right of underwriters on ship - - - - 293
See INSURANCE (MARINE).

FOREIGN SHIP—Necessaries—Jurisdiction 95
See NECESSARIES.

FOREIGN-GOING SHIP—Collision—Compulsory pilotage—Coasting trade - - 170
See COLLISION.

FREIGHT—Insurance (marine)—Prepaid freight—Cash advances for ship's disbursements - - - - 293
See INSURANCE (MARINE).

GENERAL AVERAGE—Stranded steamer—Engines, damage to — Cost of coal for working engines - - - 125
See INSURANCE (MARINE). 2.

INSURANCE (MARINE)—*Abandonment—Cash Advances for Ship's Disbursements — Prepaid Freight—Rights of Underwriters on Ship.*] The plaintiffs were insurers of the hull and machinery of the defendants' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, and was abandoned by the defendants to the plaintiffs as a constructive total loss, but the cargo of timber was subsequently duly delivered. —The plaintiffs claimed the gross freight as a benefit incident to the ship; but the defendants contended that they were entitled to deduct two sums—namely, 1677*l.* 19*s.* 10*d.* cash advanced to the master by the charterers for ship's ordinary disbursements at the port of loading under a clause in the charterparty, by which the ship was to pay "2½ per cent. commission including insurance," and a sum of 339*l.* 4*s.* 9*d.* for coals and other expenses necessarily incurred at Norfolk, Virginia, by the master to enable the ship to proceed on her voyage:—*Held*, by Bruce J., that the defendants were entitled to deduct the sum of 1677*l.* 19*s.* 10*d.*, advanced by the charterers at the port of loading as being subject to sea risk, capable of insurance, and equivalent to a prepayment of freight; but the sum of 339*l.* 4*s.* 9*d.* could not be deducted, this disbursement not having been incurred for freight alone. THE RED SEA - - - - - 293

2. —— *General Average—Stranded Steamer —Engines, Damage to—Cost of Coal for Working Engines.*] If in endeavouring to refloat a steamship stranded in a position of peril, the engines are intentionally worked, at the risk of damage, for the common safety, the damage so caused to the engines is a general average loss, and the value of the coal consumed in working the engines is also the subject of general average contribution. THE BONA - - - - C. A. 125

3. —— *Live Cattle—All Risks, including Mortality from any cause whatsoever—Detention in Port of Refuge — Extra Fodder — Suing and Labouring Clause.*] A marine policy of insurance on live cattle against all risks, including mortality from any cause whatsoever, renders the insurer liable, under the suing and labouring clause, for the extra cost of fodder supplied to the cattle whilst the vessel in which they are shipped is detained in a port of refuge for necessary repairs due to perils of the sea, for there is danger of total loss unless the expense is incurred. THE POMERANIAN - - - - 349

JOINT TORTFEASORS—Assignment of judgment —Practice - - - - 212
See PRACTICE. 2.

JUDGMENT — Assignment — Mercantile Law Amendment Act, 1856 — Collision — Decree—Joint tortfeasors - - 212
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JURISDICTION—Admiralty—Damage to cargo —Action in rem—Writ served, but warrant not served—Judgment by default *See* PRACTICE. 4. [121

—— Necessaries—Foreign ship - - 95
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LAY-DAYS — Charterparty — Running days — Lay-days - - - - 56
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LIGHTS — Collision — Steamer riding by her chains with anchors unshackled - 205
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LIMITATION OF LIABILITY—*Sailing Ship— Registered Tonnage — Navigation Spaces — The Merchant Shipping Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*The Merchant Shipping (Tonnage) Act*, 1889 (52 & 53 *Vict. c.* 43), *s.* 3, *sub-s.* 1, (*a*), (*b*), (*i.*), (*ii.*)—*The Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 79, 503.] In an action for limitation of liability:—*Held*, by Bruce J., that the owner of a *sailing* ship, in calculating the registered tonnage upon which his statutory liability in damages under s. 54 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), is based, can deduct the navigation spaces mentioned in s. 3, sub-s. 1 (*a*), (*b*), (i.), (ii.), of the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43).—*The Umbilo* ([1891] P. 118) distinguished. THE PILGRIM [117

MORTGAGE — Ship — Liabilities incurred by master — Maritime lien — Bill of exchange—Priorities - - - 49
See DISBURSEMENTS.

NECESSARIES — *Jurisdiction — Foreign Ship — Foreign Port—High Seas—Action in rem—Admiralty Court Act*, 1840 (3 & 4 *Vict. c.* 65), *s.* 6—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 5.] The plaintiffs supplied coals at Alexandria, Port Said, and Algiers to a steamship belonging to Jeddah in Asiatic Turkey, and also, at Port Said, advanced her canal dues,—To recover payment, the plaintiffs, on the arrival of the vessel in this country, commenced an action in rem for necessaries, and arrested her.—On motion by the owners of the vessel to set aside the writ for want of jurisdiction, Bruce J. granted the application:—*Held*, by the Court of Appeal (Lord Halsbury, Lindley and A. L. Smith L.JJ.), reversing the decision of Bruce J., that, under the words of s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10), "any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs," the Court had jurisdiction.—*The India* (32 L. J. (Ad.) 185) overruled. —*Semble*, that in respect of the necessaries supplied at Alexandria and Algiers, the Court also

NECESSARIES—*continued.*
had jurisdiction under s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), those places being "upon the high seas" within the meaning of that section. THE MECCA - - C. A. 95

—— Admiralty—Maritime lien—Liabilities incurred by master—Bill of exchange—Priorities—Mortgagees - - 49
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PILOTAGE — Compulsory—Collision — Coasting trade—Foreign-going ship - 170
See COLLISION.

PRACTICE—*Appeal from County Court to High Court—Security for Costs—Decree not exceeding 50l. —Point of Law—Construction of Statute—Special Provisions, General Words—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.] By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, security for costs must be given in the county court before bringing an appeal; and by s. 31, "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*"—By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, any party, in any action or matter, aggrieved by the decision of the judge in point of law, may appeal to the High Court:—*Held*, by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.), that, by the general words of s. 120 of the Act of 1888, ss. 26 and 31 of the Act of 1868 are impliedly repealed to the extent of allowing the party aggrieved by the determination of the judge in point of law to appeal, without security for costs being first given, and whether the amount involved is under or over 50*l.*; but, in respect of a question of fact, the special provisions of the Act of 1868 are left unaffected.—*The Eden* ([1892] P. 67) approved. NEPTUNE STEAM NAVIGATION COMPANY *v.* SCLATER. THE DELANO - - - C. A. 40

2. —— *Collision—Damages — Decree that a Ship and a Tug and her Tow to blame—Joint Tortfeasors—Assignment of Judgment—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.] A steamship came into collision with a tug, which was towing a barque. The owners of the steamship sued the tug and the barque for the sinking of the steamship, and the tug counterclaimed for the damage sustained by her. All three vessels were found to blame, and the decree condemned the owners of the tug and the owners of the barque in a moiety of the claim of the owners of the steamship, and condemned the owners of the steamship in a moiety of the counterclaim of the tug: *The Englishman and The Australia* ([1894] P. 239).—At the reference these amounts were ascertained, and the owners of the barque applied for an order that, on payment to the owners of the steamship of the balance due to them on the respective moieties, the owners of the steamship should, under s. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), execute an assignment of the judgment to them.—*Held*, by Bruce J., that the application must be refused, as the owners of the barque and the owners of the tug were joint tortfeasors within the principle of *Merryweather* v. *Nixan* (8 T. R. 186), and not co-debtors liable for a debt or duty within the meaning of the Mercantile Law Amendment Act, 1856. THE ENGLISHMAN AND THE AUSTRALIA - - - - 212

3. —— *Collision—Third Party—Indemnity—Rules of the Supreme Court*, 1883, *Order XVI., r.* 48.] The plaintiffs commenced an action in rem for damages sustained by their steamer by collision with the defendants' steamer. The defendants served a third party notice on the ship repairers under whose control, it was alleged, the defendants' steamer was at the time, and claimed to be indemnified by them against liability. The third parties appeared under protest; and the defendants applied for directions as to the mode of procedure:—*Held*, by Bruce J., that the application must be refused, and the third party notice set aside, as (without deciding whether the defendants would have a right of action against the third parties in the event of the defendants' vessel being found to blame) there was no contract express or implied with the third parties involving an indemnity within the meaning of the Rules of the Supreme Court, 1883, Order XVI., r. 48. THE JACOB CHRISTENSEN 281

4. —— *Jurisdiction—Damage to Cargo—Action in Rem—Writ Served, but Warrant not Served —Judgment by Default.*] A writ in rem was duly served, within the jurisdiction, by nailing it to the mast of a foreign vessel proceeded against for damage to cargo, and a warrant for her arrest was issued, but, before it could be served, the master clandestinely put to sea.—On motion for judgment by default:—*Held*, by Bruce J., that the Court had jurisdiction to pronounce judgment, for, though, according to the ordinary practice, the property proceeded against must be under the arrest of the Court, still the service of the writ by which actions in rem are now commenced is notice to all persons interested in the property of the claim indorsed on the writ, and has the same effect, so far as notice is concerned, as the service of the warrant under the former practice. THE NAUTIK - - - - - 121

5. —— *Salvage — Affidavit of Value — Appraisement—Evidence of Value—Tender—County Court Rules*, 1892, *Order XXXIX. B, rr.* 30, 31, *and* 32—*Costs.*] Under Order XXXIX. B of the County Court Rules, 1892 (rule 31) the property in an Admiralty action for salvage will not be released, except with the consent of the plaintiff, until its value has been agreed, or an affidavit of value filed on behalf of the party seeking the release, and (rule 32) if the plaintiff is dissatisfied with the value mentioned in the affidavit, he is entitled to have the value ascertained by appraisement.—In an action of salvage in a county court, the defendants tendered and paid into Court 75*l.*, and filed an affidavit, putting the value of their smack, salved by the plaintiffs, at 140*l.*, and the cargo of fish at 42*l.* 15*s.*—The plaintiffs by letter objected to the value, but did not apply for an appraisement, and, at the trial, tendered evidence putting a higher value on the smack. The county court judge held that he was bound to admit the evidence, and fixed the value of the smack at 272*l.*, and the fish salved at 48*l.*, making 320*l.*,

PRACTICE—*continued.*

and he made an award of 80*l.* (to include the 75*l.* in Court), being 40*l.* or one-eighth for salvage, and 40*l.* for loss of fishing on the part of the plaintiffs' vessel.—The defendants appealed. *Held*, by the Divisional Court (Sir F. H. Jeune, President, and Bruce J.), that, under rule 32, the plaintiffs, if dissatisfied with the value given in the affidavit, had a right of appraisement for the purpose of determining what the value of the res should be taken to be at the trial, so as to avoid the expense of calling experts, and also that the defendants might thereby have a value on which to tender. Secondly, that the tender must be upheld, as, in the exercise of the discretion, which the county court judge ought to have exercised, the evidence was, in the circumstances, inadmissible, and the affidavit of value conclusive. THE ARGO - - - - - - - 33

6. —— *Salvage—Court of Appeal—Amount of Award reduced — Apportionment — Costs.*] On appeals in salvage cases it is a general but not a hard and fast rule of practice that costs will not be given to an appellant who succeeds in reducing the amount of the salvage award.—There is not any fixed rule as to apportioning the amount of the award. THE GIPSY QUEEN - C. A. 176

7. —— *Salvage—Consolidation of Actions—Conduct of Cause—Agreement to Tow for Half-an-Hour for fixed Sum.*] The defendants' steamship, valued with cargo and freight at 43,748*l.*, broke down in the South Atlantic, and her master, in the expectation of getting the engines again to work, signed an agreement with a passing steamer (the first salvors) to pay 500*l.* for half-an-hour's towage. Just after the expiration of that period the hawser broke, killing the chief officer of the first salvors, injuring two other persons, and doing damage.—The first salvors thereupon declined to render any further assistance, and, the attempt to get the engines to work having proved unsuccessful, a French mail steamer (the second salvors), which had in the meantime come up, towed the defendants' vessel 255 miles to a place of safety.—The first and second salvors commenced separate actions, and the defendants applied to consolidate:—*Held*, by Bruce J., that in the exercise of the discretion of the Court the actions must be consolidated on the ground of convenience and economy, without regard to the consent of the parties. The practice indicated in the *Jacob Landstrom* (4 P. D. 191, 193) dissented from.—At the trial the defendants objected that no salvage services were rendered by the first salvors, that the towage was without benefit, and the sum claimed exorbitant:—*Held*, by Bruce J., that the agreement was not manifestly unfair or unjust, and, therefore, though the defendants had derived no benefit, the stipulated service having been performed, the first salvors were entitled to the agreed sum of 500*l.* THE STRATHGARRY - - - - 264

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SALVAGE—*Agreement to tow to a Place of Safety—Non-performance—Right to Salvage apart from Agreement—Refusal to consolidate Actions—Costs.*] Salvage claims rest, not upon contract, but upon the right to be paid out of the property salved, and therefore a salvor who has contributed, though to a small extent, to the ultimate safety of the disabled vessel, is not wholly disentitled to remuneration because he acted under an express agreement which he has failed to perform.—Second salvors who finally rescued the disabled vessel, and to whom substantial remuneration was awarded, had refused to consolidate their action with that of the first:—*Held*, that the extra expense thereby caused must be deducted from their costs. THE HESTIA - - 193

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